Supreme Court, U.S.
FILED
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(7) (8)

Nos. 90-1361, 90-1484

In the Supreme Court of the United States

OCTOBER TERM, 1991

HOLYWELL CORPORATION, ET AL., PETITIONERS

v.

FRED STANTON SMITH, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

FRED STANTON SMITH, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITIONS FOR WRITS OF CERTIORARI
FILED FEBRUARY 28, 1991 and MARCH 20, 1991
CERTIORARI GRANTED MAY 28, 1991

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1361

HOLYWELL CORPORATION, ET AL., RESPONDENT

v.

FRED STANTON SMITH, ET AL.

No. 90-1484

UNITED STATES OF AMERICA, PETITIONER

v.

FRED STANTON SMITH, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-SMW,
84-01591-BKC-SMW,
84-01592-BKC-SMW,
84-01593-BKC-SMW,
84-01594-BKC-SMW
Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Chapter 11 Proceedings

DOCKET ENTRIES

Nr.	Date	Proceedings
1	Dec. 28, 1987	COMPLT. FOR DECLARATORY RELIEF. am
2	Dec. 29, 1987	SUMMONS & NOTICE OF PRETRIAL, etc. am
3	Dec. 31, 1987	Certificate of Ser. cp# 2. jd

Nr.	Date	Proceedings
4	Jan. 5, 1988	AMENDED SUMMONS & NOTICE OF TRIAL. JD
5	Jan. 21, 1988	ORDER RESET TRIAL, signed, 1-21-88, set 2-11-88 @ 1P. (eod 1-27-88) jd
5a	Jan. 21, 1988	ORDER RESETTING TRIAL, signed, 1-21-88 reset for 1-26-88 @ 1:30. (eod 1-27-88) jd
5b	Jan. 21, 1988	Defendants mtn to vacate trial setting & to set a new trial date. jd
5c	Jan. 22, 1988	Certificate of srv. re: various dfts summons. jd
6	Jan. 25, 1988	ANSWER & AFFIRMATIVE DEFENSE OF HOLYWELL CORP. JD
7	Jan. 22, 1988	ANSWER & AFFIRMATIVE DEFENSES OF THE BANK OF NEW YOR TO ADVY. COMPLAINT FOR DECLARATORY RLF. jd
8	Feb. 2, 1988	ANSWER OF DEFENDANT UNITED STATES OF AMERICA. jd
9	Feb. 2, 1988	Defendants mtn for Ex Parte Order shortening time for discovery. jd
10	Feb. 2, 1988	EX PARTE ORDER SHORTENING TIME FOR DISCOVERY, signed, 2-2-88, shortened 7 days (eod 2-4-88) jd
11	Feb. 2, 1988	Notice of taking depo re: Touche Ross by V. Salter. jd

Nr.	Date	Proceedings
12	Feb. 2, 1988	Plaintiffs notice to produce. jd
13	Feb. 5, 1988	The Bank of New York's emergency mtn. for ex parte order to compel deposition and production of documents, by Vance E. Salter. am
14	Feb. 5, 1988	Defendant's mtn. for protective order. am
15	Feb. 5, 1988	Defendant's obj. to pltfs. notice to produce. am
16	Feb. 8, 1988	The Bank of New York's filing of affidavit of svc. re: subp. to wit. for depo. to Touche Ross. am
17	Feb. 8, 1988	Certificate of svc. re: CP#13, by aty. for dfdt. (The Bank of New York) am
18	Feb. 8, 1988	Plaintiffs mtn to compel production. jd
19	Feb. 8, 1988	Notice of hrg. cp# 18, set 2-9-88 @ 9:30. jd
20	Feb. 8, 1988	Defendants mtn for protective order obj. to the Bank N.Y. request for production of documents. jd
21	Feb. 8, 1988	Notice of hrg cp# 20, set for 2-9-88 @ 9:30. jd
22	Feb. 8, 1988	Notice of hrg cp# 13, set 2-9-88 @ 9:30. jd
23	Feb. 9, 1988	Request for emerg. hrg & Notice of filing telecopy of mtn for reconsideration of the courts ruling concerning production of Miami Center Joint Venture Tax Returns.

Nr.	Date	Proceedings
24	Feb. 9, 1988	ORDER ON PENDING MTN., signed, 2-9-88 e: cp# 18, 20 gr. (eod 2-17-88) 25
25	Feb. 10, 1988	Defendants Emerg. mtn for reconsideration of 2-9-88 "Order on pending mtn". jd
26	Feb. 16, 1988	Subpoena to Wit re: C G Benson Jr. jd
27	Feb. 17, 1988	AGREED ORDER ON O& Y/ MCJV'S FOR RECONSIDERATION OF THE COURT RULING (2-4-88) CONCERNING PRODUCTION OF MIAMI CENTER JOINT VENTURE TAX RETURNS, signed, 2-16-88 (eod 2-17-88) jd
24a	Feb. 10, 1988	Certificate of srv on sub to wit re: Touche Ross. jd
24b	Feb. 11, 1988	Memorandum in support of Emerg. mtn for reconsideration of 2-9-88 "Order on Pendings mtn of Holywell Corp. by R Mark. jd
28	Feb. 19, 1988	EXHIBIT REGISTER DTD. 2-11-88. (expandable folder) jd
29	Feb. 18, 1988	Transcript dtd. 2-9-88 re: Excerpt from proceedings. jd
30	Feb. 18, 1988	Certificate of mlg. cp# 23, by J Kozyak. jd
22a	Feb. 8, 1988	Response to Emerg. mtn to compel., by J Kozyak. jd

Nr.	Date	Proceedings
31	Mar. 1, 1988	Defedants obj. to mtn to strike, & Rule 9011 mtn for sanctions. jd
32	Mar. 8, 1988	Defendants mtn for judicial notice, by R Mark. jd
33	Mar. 9, 1988	Notice of hrg. cp# 31b, set for 3-22-88 @ 9:30. jd
34	Mar. 11, 1988	Notice of hrg. cp# 32, set for 3-22-88 @ 9:30. jd
35	Mar. 18, 1988	Defendant Bank of NY notice of reliance on additional auth. in support of its positions. jd
31a	Feb. 11, 1988	TRANSCRIPT dtd. 2-11-88 mtn for order requiring complaince etc. jd
36	Mar. 22, 1988	AGREED ORDER W/D RULE 9011 MTN FOR SANCTIONS & GR MTN TO STRIKE (3-22-88) (EOD 3-23-88) JD
37	Mar. 22, 1988	RESPONSE to debtors obj, mtn to strike & Rule 9011 mtn for sanctions, by pltf. jd
38	Mar. 22, 1988	ORDER (SMW) GR. mtn for judicial notice (EOD 3-31-88) jd
39	Apr. 15, 1988	EMERGENCY MTN by dfdt U S of America. jd.
40	Apr. 19, 1988	TRANSCRIPT hrg dtd 3-22-88 re: mtn for final hrg regarding clm # 502. jd
41	Apr. 25, 1988	NOTICE of hrg cp# 39, set 4-26-88 @ 1:30. jd

Nr.	Date	Proceedings
42	Apr. 29, 1988	FINDINGS OF FACT & CONCLUSION OF LAW (SMW 4-28-88) (EOD 4-29-88) JD
43	Apr. 29, 1988	FINAL JUDGMENT (SMW 4-28-88) in favor of pltf. (EOD 4-29-88)
44	Apr. 29, 1988	ORDER (SMW 4-29-88) DENYING MTN of U S OF AMERICA. (EOD 5-2-88) jd
45	May 3, 1988	NOTICE of Appeal by U S of America. jd
46	May 4, 1988	CERTIFICATE of mlg cp# 45, by N Shepherd. jd
47	May 4, 1988	NOTICE of Appeal by Holywell Corp. jd
48	May 5, 1988	CERTIFICATE of mlg cp# 47 by N. Shepherd. jd
49	May 11, 1988	DESIGNATION of Record & Issues by ddt U S of America. jd
50	May 13, 1988	NOTICE OF ENTRY rule 8007(b). jd
49a	May 11, 1988	MEMORANDUM of Law in support of response to emerg. mtn of appellant U S of America for stay by Herbert Stettin. jd
51	May 18, 1988	STATEMENT of Issues on Appeal. jd
52	May 18, 1988	DESIGNATION of Record. jd
53	May 18, 1988	Robert A Mark ltr dtd 5-18-88 re: cp#'s 51 & 52. jd

Nr.	Date	Proceedings
54	June 22, 1988	NOTICE of entry of rule 8007(b). (USDC#88-1053-CIV-JWK)
55	July 8, 1988	ORDER DENYING (TCB FOR SMW 7-8-88) EMERG. MTN FOR RECONSIDERATION OF 2-8-88 ORDER ON PENDING MTNS. (EOD 7-11-88) jd
53a	June 1, 1988	*MEMORANDUM from appeals clerk to U.S.D.C. re: transmittal of appeal record. U.S.D.C. case # 88-1053-CIV-KEHOE Exhbits returned to BKC: jd
56	June 26, 1988	RESPONSE to reply of U S of America to trustee's notice of supplemental auth. by F Stanton Smith. jd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-0795-CIV-KEHOE

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

THE UNITED STATES OF AMERICA, APPELLANT

v.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, APPELLEE

HOLYWELL CORPORATION, ET AL., APPELLANTS

v.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, APPELLEE

On Appeal from the United States Bankruptcy Court for the Southern District of Florida

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DOCKET ENTRIES

Nr.	Date	Proceedings
1	May 5, 1988	NOTICE of Appeal to District Court from Bankruptcy Judge's Decision.
–	May 5, 1988	RECORD recd from BKC consisting of 1 file folder & BKC docket sheet.

Nr.	Date	Proceedings
2	May 5, 1988	EMERGENCY MOTION for Stay, by Appellant.
3	May 9, 1988	NOTICE of entry purs to Rule 8007(b) in re: Appeal from "Findings of Fact & Conclusions of Law & Final Judgement" entered 4/28/88 by Judge Weaver. (Copies to BKC & Attys of record).
4	May 11, 1988	MOTION for expedited hrg on emergency mot of appellant USA for stay, by Fred Stanton Smith, as liquidating Trustee of Miami Center Liquidating Trust.
5	May 11, 1988	RESPONSE to emergency mot of appellant USA for stay, by appellee The Bank of New York.
6	May 13, 1988	VERIFIED resp to appellee's mot for expedited hrg, by Holywell Corp, Miami Center Ltd. Partnership, Miami Center Corp., Chopin Assoc. & Theodore B. Gould.
7	May 16, 1988	MOTION to cont resolution of emergency mot, by appellant USA.
8	May 17, 1988	RESPONSE to emergency mot of appellant USA for stay, by Trustee
9	May 25, 1988	ORDER JWK-5/25/88) GRANTING M/Stay pending hrg in early June & DENYING M/expedited hrg. (EOD 6/1/88-CCAP).
10	June 3, 1988	MOTION to intervene w/Memo, by SHUTTS & BOWEN.

Nr.	Date	Proceedings
11	June 3, 1988	MEMO in opp to Emergency m/ stay, by SHUTTS & BOWEN.
12	June 6, 1988	STIP for setting emerg hrg on m/ stay, by Ptys.
13	June 9, 1988	MOTION to intervene & Memo in supp of m/stay, by Movants.
14	June 20, 1988	ORDER (JWK-6/20/88) GRANTING movants mots to intervene. (EOD 7/15/88-CCAP).
15	June 20, 1988	ORDER (JWK-6/20/88) GRANTING Appellant's emerg m/Stay. (EOD 7/15/88-CCAP).
16	June 22, 1988	RESPONSE to Order of Stay, by Ptys.
17	June 27, 1988	INITIAL Brief, by Appellants HOLYWELL, MCLP, MCC & CHOPIN ASSOC.
18	June 29, 1988	Brief, by Appellant U.S.A.
19	July 13, 1988	Brief, by Appellant SHUTTS & BOWEN.
20	July 13, 1988	CONSOLIDATED Answer brief, by Appellee BANK.
21	July 13, 1988	ANSWER Brief, by Trustee SMITH.
22	July 20, 1988	REPLY Brief, by Appellants.
23	July 20, 1988	REPLY Brief, by USA.
24	Aug. 30, 1988	MOTION to Dism appeals as MOOT, by Appellee BANK.
25	Sept. 12, 1988	MOTION for enlargement of time to respond to Appellee's m/dism

Nr.	Date	Proceedings
		appeals as moot, by Appellants Chopin Assoc., MCC, MCLP & Gould & Holywell.
26	Sept. 12, 1988	OPPOSITION to BNY's m/dism appeals as moot, by Appellant USA
27	Sept. 20, 1988	REPLY memo re: Dismissal of apeal as moot, by BANK.
28	Sept. 20, 1988	OPPOSITION to M/Dism appeal as moot, by Appellants.
29	Sept. 27, 1988	ORDER (JWK-9/27/88) GRANTING M/ext of time up to & incl. 9/20/88. (EOD 10/3/88-CC
30	Oct. 19, 1988	NOTICE of setting cause for oral argument 10/28/88 @ 9 a.m. (JWK-10/19/88)
31	Oct. 27, 1988	MOTION for Judicial notice, by Appellants.
32	Oct. 31, 1988	NOTICE of addl auth, w/attachment, by Appellee Fred Stanton Smith.
33	Nov. 21, 1988	NOTICE of suppl authority, by HOLYWELL Appellants.
34	Dec. 5, 1988	MEMO in resp to Appellants' notice of suppl auth, w/exhs, by Appellee Bank
35	Dec. 16, 1988	REPLY to memo in resp to notice of suppl auth., by Appellant HOLYWELL.
36	Dec. 19, 1988	REPLY to memo in resp to notice of suppl auth., by Appellant USA.

Nr.	Date	Proceedings
37	Dec. 20, 1988	MOTION for authorization to consumate ad valorem tax settlement, by SMITH.
38	Dec. 23, 1988	NOTICE of filing suppl auth., by SMITH.
39	Dec. 30, 1988	RESPONSE to notice of suppl auth of SMITH, by Appellants HOLYWELL.
40	Jan. 4, 1989	OBJECTIONS to Trustee's M/authorization to consumate ad valorem tax settlement, by Appellants.
41	Jan. 13, 1989	REPLY to Notice of reliance on addt'l auth., by Appellants.
42	Jan. 25, 1989	OPPOSITION to Trustee's M/Authorize consumation of ad valorem tax settlement, by Appellant USA.
43	Mar. 22, 1989	NOTICE of reliance up addtl auth, by Appellee BANK.
44	Mar. 16, 1989	ORDER (JWK-3/16/89) CONSOLIDATING case w/88-1053-CIV-JWK. (EOD 3/28/89-CCAP)
45	May 3, 1989	MOTION for a status conf., by Shutts & Bowen
46	June 13, 1989	NOTICE of filing suppl auth, by appellee Smith.
47	June 16, 1989	NOTICE of reliance on addl authority, by Appellant U.S.A.
48	June 20, 1989	REPLY to Trustee's suppl authority, by Appellant U.S.A.

Nr.	Date	Proceedings
49	June 22, 1989	MOTION for Judicial notice and reply to trustee's suppl authority, by Holywell Corp and T.B. Gould.
50	June 26, 1989	RESPONSE to notice of U.S.A. reliance on addl authority, by Appellee Bank.
51	July 7, 1989	REPLY to Bank's resp to USA's reliance on add'l authority, by Appellants Holywell and Gould.
52	July 31, 1989	MEMO OPINION (JWK-7/31/89) AFFIRMING F/J and Findings of Fact & Concl of Law entered by BKC on 4/28/88. Bank's m/dism appeal as moot is GRANTED in part and DENIED in part, as set forth in sect II *supra*. The stay of BKC's F/J entered 6/20/88 is VACATED. Intervenor's request to pay costs and fees awarded by BKC is now MOOT. Liquidating trustee's M/to lift stay is now MOOT. (EOD-8/1/89-CCAP).
53	July 31, 1989	NOTICE of entry purs to Rule 8016(b) in re: Appeal from "Findings of Fact & Conclusions of Law & Final Judgment" entered 4/28/88 by Judge Weaver. (Copies to BKC & Attys of Record).
54	July 25, 1989	MOTION for order authorizing payment of pre-petition unsecured claim, by Argonaut Ins. Co.

Nr.	Date	Proceedings
55	July 25, 1989	REQUEST for hrg on M/for order authorizing payment of pre-petition unsecured claim, by Argonaut Ins. Co.
56	Aug. 7, 1989	MOTION for stay pending appeal, by appellant USA.
57	Aug. 8, 1989	MEMO in opp to appellant USA's emergency M/stay, by intervenor Shutts & Bowen.
58	Aug. 8, 1989	RESPONSE in opp to appellant USA's M/stay, by appellee F. Stanton Smith.
59	Aug. 9, 1989	MEMO in opp to appellant USA's emergency M/stay, by appellee Bank of New York.
60	Aug. 14, 1989	ORDER (JUWK-8/14/89) STAYING memo decision entered 7/31/89 until 8/25/89. (EOD—8/22/89-CCAP).
61	Aug. 30, 1989	*NOTICE OF APPEAL* by U.S.A. from memo opinion entered 7/31/89. (Copies to USCA, BKC & Attys of Record & AUSA) (NO FEE REQ'D)
62	Aug. 25, 1989	ORDER (JWK 8/25/89) DENYING emergency M/stay pending appeal. (EOD 8/31/89-CCAP)
63	Sept. 1, 1989	*NOTICE OF APPEAL* by HOLYWELL CORP., MIAMI CENTER LTD. PARTNERSHIP, MIAMI

Nr.	Date	Proceedings
		CENTER CORP., CHOPIN ASSOC. & THEODORE B. GOULD from memo opinion entered 7/31/89. (Copies to USCA, BKC, AUSA & Attys of Record) (FEE paid #82079)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-1053-CIV-KEHOE

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

THE UNITED STATES OF AMERICA, APPELLANT

v.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, APPELLEE

HOLYWELL CORPORATION, ET AL., APPELLANTS

v.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, APPELLEE

On Appeal from the United States Bankruptcy Court
for the Southern District of Florida

DOCKET ENTRIES

Nr.	Date	Proceedings
1	June 10, 1988	NOTICE of Appeal to Dist. Court from Bankruptcy Judge's Decision.
–	June 10, 1988	RECORD recd from BKC consisting of 1 file folder & 1 accordian folder of designated items. Note – All transc & exhs designated are filed under 88-795-CIV-JWK.

Nr.	Date	Proceedings
2	June 13, 1988	NOTICE of entry purs to Rule 8007(b) in re: Appeal from "Final Judgment" & the "Findings of Fact & Conclusions of Law" entered 4/28/88 by Judge Weaver. (Copies to BKC & Attys of record).
3	June 20, 1988	MOTION to consolidate w/memo, by Appellants.
4	June 27, 1988	CONSENT to conslidation, by Trustee SMITH.
5	June 27, 1988	INITIAL Brief, by Appellants.
6	July 13, 1988	CONSOLIDATED Answer brief, by BANK OF NEW YORK.
7	July 13, 1988	ANSWER Brief. by Trustee SMITH.
8	Aug. 30, 1988	MOTION to Dism appeals as MOOT, by Appellee BANK.
9	Sept. 12, 1988	MOTION for enlargement of time to respond to Appellee's M/dism appeals as moot, by Holywell, Chopin, MCC, MCLP & Gould, Appellants
10	Sept. 12, 1988	OPPOSITION to BNY's M/dism appeals as moot, by Appellant USA
11	Sept. 20, 1988	OPPOSITION to m/dism appeal as moot, by HOLYWELL Appellants.
12	Sept. 20, 1988	REPLY Memo re: Dism of appeal as moot, by BANK.
13	Sept. 27, 1988	ORDER (JWK 9/27/88) GRANTING ext of time up to & incl. 9/20/88. (EOD 10/3/88-CCA

Nr.	Date	Proceedings
14	Oct. 19, 1988	NOTICE of setting oral argument 10/28/88 @ 9 a.m. (JWK 10/19/88).
15	Oct. 27, 1988	MOTION for Judicial notice, by Appellants.
16	Dec. 5, 1988	MEMO in resp to Appellants' notice of suppl auth, w/exhs, by Appellee Bank.
17	Dec. 19, 1988	REPLY memo to BANK's memo in resp to Notice of suppl auth, by Appellant USA.
18	Dec. 29, 1988	RESPONSE to notice of suppl auth of SMITH, by Appellants HOLYWELL.
19	Jan. 4, 1989	OBJECTIONS to Trustee's M/ auth to consumate settlement, by Appellants.
20	Jan. 13, 1989	REPLY to Notice of reliance on addt'l auth, by Appellants.
21	Jan. 25, 1989	OPPOSITION to Trustee's m/authorize tax settlement, by Appellant USA.
22	Mar. 16, 1989	ORDER (JWK 3/16/89) CONSOLIDATING case w/88-795-CIV-JWK. (EOD 3/28/89)
23	Mar. 22, 1989	NOTICE of reliance upon addl auth, by Appellee BANK.
24	Mar. 30, 1989	ANSWER to notice of reliance upon addl auth, by Appellants.
25	June 13, 1989	NOTICE of filing suppl auth. by Appellee SMITH.
26	June 16, 1989	NOTICE of reliance on addl authority, by Appellant U.S.A.

Nr.	Date	Proceedings
27	June 20, 1989	REPLY to trustee's suppl authority, by Appellant U.S.A.
28	June 26, 1989	RESPONSE to notice of U.S.A. reliance on addl authority, by Appellee Bank of N.Y.
29	July 7, 1989	REPLY to Bank's resp to USA's reliance on add'l authority, by Appellants Holywell and Gould.
30	July 31, 1989	MEMO OPINION (JWK-7/31/89) AFFIRMING F/J and Findings of Fact & Concl of Law entered by BKC on 4/28/88. Bank's m/dism appeal as moot is GRANTED in part and DENIED in part, as set forth in sect II *supra*. The stay of BKC's F/J entered 6/20/88 is VACATED. Intervenor's request to pay costs and fees awarded by BKC is now MOOT. Liquidating trustee's m/to lift stay is now MOOT. (EOD-8/1/89-CCAP).
31	July 31, 1989	NOTICE of entry purs to Rule 8016(b) in re: Appeal from "Findings of Fact & Concl of Law & Final Judgment" entered 4/28/88 by Judge Weaver. (Copies to BKC & Attys of record).
32	July 25, 1989	MOTION for order authorizing payment of pre-petition unsecured claim, by Argonaut Ins. Co.
33	July 25, 1989	REQUEST for hrg on M/for order authorizing payment of pre-petition unsecured claim, by Argonaut Ins. Co.

Nr.	Date	Proceedings
34	Aug. 7, 1989	EMERGENCY MOTION for stay pending appeal, by appellant USA.
35	Aug. 8, 1989	MEMO in opp to appellant USA's emergency M/stay, by intervenor Shutts & Bowen.
36	Aug. 8, 1989	RESPONSE in opp to appellant USA's emergency M/stay, by appellee F. Stanton Smith.
37	Aug. 9, 1989	MEMO in opp to appellant USA's emergency M/stay, by appellee Bank Of New York.
38	Aug. 14, 1989	ORDER (JWK-8/14/89) STAYING memo decision entered 7/31/89 until 8/25/89. (EOD-8/22/89-CCAP).
39	Aug. 30, 1989	*NOTICE OF APPEAL* by U.S.A. from memo opinion entered 7/31/89. (Copies to USCA, AUSA, BKC & Attys of Record) (NO FED REQ'D)
40	Sept. 1, 1989	*NOTICE OF APPEAL* by HOLYWELL CORP., MIAMI CENTER LTD. PARTNERSHIP, MIAMI CENTER CORP., CHOPIN ASSOC. & THEODORE B. GOULD from memo opinion entered 7/31/89. (Copies to USCA, BKC, AUSA & Attys of Record) (NO FEE PAID)
—	Sept. 6, 1989	CLERK's receipt #82137 in the amt of $105.00 for payment of NOA filed 9/1/89.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5862

IN RE: HOLYWELL CORPORATION, DEBTOR

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, PLAINTIFF-APPELLEE

versus

UNITED STATES OF AMERICA, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD, DEFENDANTS-APPELLANTS

SHUTTS & BOWEN, INTERVENOR

BANK OF NEW YORK, DEFENDANT-APPELLEE

IN RE: HOLYWELL CORPORATION, DEBTOR

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, PLAINTIFF-APPELLEE

versus

UNITED STATES OF AMERICA, DEFENDANT

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD, DEFENDANTS-APPELLANTS

SHUTTS & BOWEN, INTERVENOR

BANK OF NEW YORK, DEFENDANT-APPELLEE

DOCKET ENTRIES

Date	Proceedings
Aug. 31, 1989	Dup. Notice of Appeal and D.C. Docket Entries & Order
	Sent to juris. screening.
	Appellant's (USA) Emergency Motion for Stay of Judgment and Order Pending Appeal and Motion for Expedited Consideration of Emergency Motion for Stay of Judgment and Order Pending Appeal.
Sept. 1, 1989	Order that the Judgment and Order Pending Appeal are temporarily Stayed until 5:00 p.m. on September 8, 1989, in order that the Court can consider the response, which is to be filed on September 6, 1989. In the meantime, the appeal is expedited and the Clerk is instructed to set a briefing schedule and put this case on the next available oral argument calendar. (PHR)
Sept. 5, 1989	The Bank of New York's Memorandum in Opposition to the Appellant's Emergency Motion fot Stay of Judgment and Order Pending Appeal. (J)
Sept. 5, 1989	Fred Stanton Smith's Memorandum in Opposition to Emergency Motion for Stay of Judgment and Order Pending Appeal. (J)
Sept. 6, 1989	Memorandum of Intervenor Shutts & Bowen in Opposition to the United States Emergency Motion for Stay of Judgment & Order pending Appeal (J)
Sept. 8, 1989	Appeal Information Sheet

Date	Proceedings
Sept. 8, 1989	NOA. DCDS & Order
	Appellant's motion for leave to file a response in support of emergency motion for stay of judgment and order pending appeal. bm.
	Holywell Corporation's memorandum in support of the government emergency motion for stay. bm.
	Order: The motion for stay pending appeal of the judgment and order in this case is GRANTED. The previous order expediting the appeal remains in effect. Appellant's motion for leave to file a response is moot. PHR/PAK/JLE. bm.
Sept. 21, 1989	Brief for Appellant Holywell
Sept. 21, 1989	Brief for Appellant USA
Sept. 21, 1989	Record Excerpts Holywell, USA
Oct. 5, 1989	Case assigned for Oral Argument for November 1, 1989
Oct. 10, 1989	Record on Appeal – No of Vols 7
Oct. 10, 1989	Brief for Amicus (Ce'd)
Oct. 11, 1989	Brief for Appellee (Smith) (CE'd)
Oct. 11, 1989	Brief for Appellee (Bank of NY) (CE'd)
	Brief for Cr. Appellee
Oct. 23, 1989	Reply Brief for Appellant (Holywell)
Oct. 23, 1989	Reply Brief for Appellant (USA) (CE'd)
Nov. 1, 1989	Oral Argument
Nov. 9, 1989	Appellant, Theodore B. Gould's, motion for leave to file response to comments at oral argument. bm.
Nov. 17, 1989	Appellee Fred Stanton Smith's motion to allow notice of supplemental authority. bm.

Date	Proceedings
Nov. 22, 1989	Order: Appellant Theodore B. Gould's motion for leave to file response to comments at oral argument is GRANTED. JWH. bm.
Nov. 22, 1989	Appellant Gould's response to comments at oral argument. bm.
Nov. 22, 1989	Appellee Fred Stanton Smith's motion to submit supplemental authority. bm.
Nov. 27, 1989	Appellant USA's motion for leave to file order regarding related proceeding. bm.
Nov. 28, 1989	Motion of appellee, The Bank of New York, to strike (or for leave to respond to) appellant Theodore B. Gould's post-argument brief. bm.
Dec. 6, 1989	Appellant Gould's motion for leave to file answer to the Bank of New York's reply to Gould's memorandum after oral argument. bm.
Dec. 6, 1989	Appellee Smith's motion to respond to submission of of appellant USA. bm.
Jan. 17, 1990	Order: Appellee Fred Stanton Smith's motion to allow notice of supplemental authority is GRANTED. JWH. bm.
Jan. 17, 1990	Order: Appellee's, Fred Stanton Smith, motion to submit supplemental authority is DENIED. JWH. bm.
Jan. 17, 1990	Order: Appellant United States of America's motion for leave file order regarding related proceedings, construed as a motion for leave to file supplemental authority, is DENIED. Appellee The Bank of New York's motion to strike appellant Gould's post-argument brief is DENIED.

Date	Proceedings
	Appellee The Bank of New York's alternative motion for leave to respond to appellant Gould's post-argument brief is DENIED.
	Appellee Smith's motion to respond to submission of supplemental authority of appellant USA is DENIED.
Jan. 17, 1990	Appellant Gould's motion to file answer to the Bank of New York reply to appellant Gould's memorandum after oral argument is DENIED. JWH. bm.
May 8, 1990	Appellants', Holywell, Miami Center Ltd., Miami Center Corp, Chopin Associates, and Theodore B. Gould, motion for stay of related proceedings in lower courts. bm.
June 6, 1990	Appellants' supplemental authority. CE'd. bm.
May 21, 1990	Appellee Smith's memorandum in opposition to motion for stay of related proceedings in lower courts. bm.
May 24, 1990	Appellee Bank of New York's memorandum in opposition to debtors motion for stay. bm.
May 31, 1990	Appellant Gould's reply to Trustee's memorandum in opposition to motion for stay of related proceedings in lower courts. bm.
July 9, 1990	Order. Appellants' motion for stay of related proceedings in lower courts is DENIED. JWH/ERC/AJH. bm.
July 20, 1990	Apellee's, Bank of New York, supplemental authority. bm. CE'd.
Aug. 27, 1990	Motion leave to file Supp. Brief.

Date	Proceedings
Aug. 28, 1990	Order. Leave to File Supp. Brief Denied. JWH.
Sept. 18, 1990	Opinion and Judgment
Sept. 27, 1990	Bill of Costs
Sept. 28, 1990	Motion for Ext. to petition for Rehearing in Banc
Oct. 2, 1990	Appellee's, Bank of New York, response to motion for extension time to file petition for rehearing. bm.
Oct. 2, 1990	Appellee Smith's response to motion for extension of time to file petition for rehearing. bm.
Oct. 3, 1990	Appellants' motion for leave to file suggestion of rehearing in banc with excess pages. bm.
Oct. 19, 1990	Intervenor's motion and memorandum in support of motion for relief from stay.
Oct. 24, 1990	Order: Appellants, Holywell Corporation, Miami Center Limited Partnership. Miami Center Corporation and Chopin Associates, motion for leave to file suggestion of hearing in banc with excess pages, not exceeding 17 pages, is DENIED. JWH. bm. (J)
Oct. 24, 1990	Appellants' Holywell Corporation and Theodore B. Gould objections to intervenor's motion for relief from stay of mandate. bm.
Nov. 6, 1990	Petition for Rehearing in Banc, Appellant.
Dec. 12, 1990	Order Denying Rehearing.

Date	Proceedings
Dec. 28, 1990	Motion for stay of mandate.
Jan. 2, 1991	Memorandum of appellee, The Bank of New York, in opposition to the debtor/ appellants' motion for stay of mandate. dfb.
Jan. 3, 1991	Intervenor Shutts & Bowen's objection to appellants' motion for stay of mandate and continuation of order of September 8, 1989. dfb.
Jan. 3, 1991	Appellee Fred Stanton Smith's response in opposition to motion for stay of mandate and continuation of order of September 8, 1989. dfb.
Jan. 15, 1991	Appellee, Bank of New York's motion for leave to submit supplemental authority. dfb.
Jan. 17, 1991	Order: Appellee Bank of New York's motion for leave to submit supplemental authority in support of its response to appellants' motion for stay of the mandate is DENIED. JWH. dfb.
	Order: Motion for stay of mandate Denied, JWH.
	Jdgt. as Mdt. Issued to clerk. dfb.
	Record on appeal Retd. to clerk (7 vols).
	Exhibits Retd. to clerk (1 acc. folder).
Mar. 4, 1991	Notice of Flg. of Cert. Pet. on Feb. 28, 1991.
Mar. 27, 1991	Ntc. of Flg. Cert.
May 31, 1991	Order of S.C.: Granted & Consolidated both cases [No. 90-1484, No. 90-1361].

U.S. BANKRUPTCY COURT PLAINTIFF'S EXHIBIT 8

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 Proceedings

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

CONSOLIDATED PLAN OF REORGANIZATION

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The Bank of New York submits the following Plan of Reorganization:

I. *DEFINITIONS*

In addition to such other terms as are defined in other Articles of this Plan, the following terms have the following meanings as used in this Plan:

Administration Claim: A cost or expense of administration of these Chapter II cases, including any actual, necessary expenses of preserving the estates, and any actual, necessary expenses of operating the Debtors' businesses from and after the Petition Dates, to an including the Confirmation Date, and all allowances approved by the Court in accordance with the Code.

Affiliated Creditors: Any "affiliate" of any of the Debtors as "affiliate" is defined in Code § 101(2), including but not limited to, any of the Debtors, any corporations that are wholly or partially owned, either directly or indirectly, by all or any of the Debtors, and any entities in which any or all of the Debtors own an equity interest, including, but not limited to, Twin Development Corporation, HWL Corporation, Parkwell, Inc., Orion Industries, Inc., Parkwell of Florida, Inc., Holywell Construction Co., Charleston Center Corp., Pietro Belluschi & Associates, Inc., NHA corp., Studley-Holywell Assoc., Inc., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG Institute, Whitehall Security of Florida, Inc., Whitehall Building Services of Florida, Inc., Orion Engineering of Florida, Inc., Holywell Management of Florida, Inc., Racing Club of Florida, Inc., Holywell Hotels of Florida, Inc., Holywell Trading of Florida, Inc., Holywell Insurance Company, Corpus Christi Associates and Great Western Bank Building Associates, but not including MCJV.

Allowed Claim: A Claim, (a) a proof of which is filed within the time fixed by the Bankruptcy Rules (hereinafter defined) or by the Court, or if the Claim arose from the rejection of an executory contract or unexpired lease, within such other time as may be fixed by the Court, or (b) that has been, or hereafter is, scheduled by Debtors as liquidated in the amount and not disputed or contingent; as to which no objection to the allowance thereof has been filed within any applicable period of time fixed by an order of the court, or as to which any such objection has been determined by a Final Order.

Bank, The Bank, BNY: The Bank of New York.

Bankruptcy Code or Code: Title 11 U.S.C. Sections 101 *et seq*.

Bankruptcy Rules: The Bankruptcy Rules as prescribed by the Supreme Court of the United States, to take effect on August 1, 1983.

BNY Debt: The indebtedness, including interest at the pre-default contract rate to January 31, 1984 and at the post-default contract rate from February 1, 1984, due to BNY from MCLP and Chopin in the amount of approximately $234,342,743 as of March 14, 1985 plus expenses of approximately $1,611,563 to March 14, 1985.

BNY Holywell Loan: The $1,750,000 loan made by BNY to Holywell on October 23, 1982, which loan was guaranteed by Gould, plus interest to October 23, 1983 to August 31, 1984 at the pre-default contract rate and from September 1, 1984 at the post-default contract rate.

Claim: Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any of the Debtors in existence on or as of their respective Petition Dates as described in Section 101(4) of the Code.

Confirmation Date: The date of the entry by the Court of the Order of Confirmation (hereinafter defined).

Court: The United States Bankruptcy Court for the Southern District of Florida, including the Bankruptcy Judge presiding in the Debtors Chapter 11 cases, and any Court having competent jurisdiction to hear appeals therefrom.

Creditor: Any person that holds an Allowed Claim, including governmental units.

Chopin: Chopin Associates, a Florida partnership, one of the Debtors.

Creditors Committees: The Creditors Committee of the each of the Debtors, appointed by order of the Bankruptcy Court.

Debtor or Debtors: Gould, MCC, MCLP, Chopin and Holywell, individually and collectively.

Debtors' Plans: The five plans of reorganization, dated February 15, 1985, filed by each of the Debtors'.

Disputed Claim: A claim other than the BNY Debt and the BNY Holywell Loan (i) scheduled by the Debtors as disputed, contingent, undetermined, unliquidated or unknown; or (i) as to which a timely proof of claim and objection has been filed, and which has not been determined by a Final Order.

Effective Date: The date upon which the Order of Confirmation is no longer subject to appeal, on which date no such appeal is then pending, and on which date all of the conditions to the effectiveness of the Plan expressly set forth in the Plan have been satisfied fully or effectively waived.

Final: Shall mean, with respect to any order, decree or judgment of any Court, that such order, decree or judgment is no longer subject to appeal or rehearing and as to which no appeal, rehearing or motion for rehearing is then pending.

FF&E: The furniture, fixtures and equipment owned by or leased to MCLP pursuant to the FF&E leases.

FF&E Leases: The following four FF&E leases:

1. Lease, dated May 14, 1981, between MCLP, as Lessee and MCJV, as Lessor covering certain fixtures and equipment used in the Pavilion Hotel "Category A Lease").

2. Lease, dated May 14, 1981, between MCLP, as Lessee and "CJV, as Lessor covering certain furniture, fixture and equipment used in the Pavilion Hotel "Category B Lease").

3. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities covering certain furniture, fixture and equipment used in the Pavilion Hotel (the "Category C Lease").

4. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities covering certain furniture, fixture and equipment used in the Pavilion Hotel (the "Category D Lease").

Gould: Theodore B. Gould, an individual, one of the Debtors.

Gould Entities: Any of the entities comprising the defined term "Affiliated Creditors", which are directly or indirectly 100% owned by Gould, including but not limited to, Twin Development Corporation, Holywell, Whitehall Security, Inc., Orion Industries, Inc., Orion Engineering Services, Inc., Charleston Center Corp., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG In-

stitute, Racing Club of Florida, Inc., Parkwell Inc., Parkwell of Florida, Inc., Holywell Construction Company, Holywell Management Company of Florida, Inc., HWL Corporation, Peitro Belluschi & Associates, Inc., Holywell Hotels, Inc., Holywell Telecommunications Company, Holywell Trading of Florida, Inc., Holywell Real Estate Holywell Telecommunications of Florida, Inc., Holywell Insurance Company, Corpus Christi Associates, Great Western Bank Building, WHA Corp. and Studley-Holywell Assoc, Inc., but not including MCJV.

Gould FF&E Leases: shall mean collectively, the Category C and Category D Leases.

Holywell Corporation: a Delaware corporation, one of the Debtors.

Market Value [illegible]5,600,000, the appraised market value of Miami C[illegible] as of November 15, 1984 as indicated in an appra[illegible] report by Charles V. Failla & Associates, Inc., which report was certified by Charles V. Failla & Associates, Inc., M.A.I.

MCLP: Miami Center Limited Partnership, a Florida limited partnership, one of the Debtors.

MCC: Miami Center Corporation, a Florida corporation, one of the Debtors.

MCJV Claim: shall mean the claim of MCJV filed by O&Y Florida on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity for unpaid rent due under the MCJV FF&E Leases.

MCJV FF&E Leases: shall mean collectively the Category A and Category B Leases.

MCJV Property: Those unimproved parcels of land adjacent to, or near, Miami Center that are owned by MCJV.

MCJV: Miami Center Joint Venture, a Florida partnership, the partners of which are Gould and O&Y Florida.

Miami Center: The parcel of land located in Miami, Dade County, Florida owned by Chopin and leased to MCLP upon which there is constructed an office/hotel complex.

Miami Center Closing Date: 45 days from the Effective Date.

Order of Confirmation: The Order entered by the Court confirming the Plan in accordance with the provisions of Chapter 11 of the Code.

O&Y: shall mean O&Y Equity and O&Y Florida, collectively.

O&Y Equity: Olympia & York Equity Corp., a New York corporation.

O&Y Florida: Olympia & York Florida Equity Corp., a Florida corporation.

O&Y Arbitration: The arbitration proceeding known as *The Matter of Arbitration between Theodore B. Gould, Claimant and Olympia & York Florida Equity Corp. and O&Y Equity Corp., Respondents* (Case No. 13-115-0547-82) which proceeding resulted in an Award, dated June 1, 1984. On or about September 20, 1984 O&Y filed a motion requesting the Court to lift the automatic stay, to remove Gould as managing joint venture partner and to require Gould to deliver documents to effectuate his removal. On October 24, 1984 an Order was entered denying that part of O&Y's Motion requesting the removal of Gould and the delivery of documents for his removal but granting a lifting of the automatic stay for the limited purpose of permitting O&Y or Gould to contest the Award. O&Y subsequently brought an action in the United States District Court for the Southern District of

New York (Case No. 82-CIV-5918 (WK)), which action seeks to modify or vacate the Award. A hearing was held on February 1, 1985 before Judge Knapp of the Southern District, who reserved decision on the motion.

O&Y Claim: The Claim filed by O&Y Florida against certain of the Debtors on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity.

Pavillon Hotel: The hotel located in Miami Center.

Parkwell: Collectively, Parkwell Inc., and Parkwell of Florida, Inc., both wholly owned subsidiaries of Holywell.

Pending Litigation: Shall mean the actions described in Exhibit C annexed hereto pending by or against any or all of the Debtors, which Exhibit was taken verbatim from the Debtors' Plans.

Petition Dates: August 22, 1984, the dates on which the Debtors filed their respective Chapter 11 petitions with the Court.

Plan: This Chapter 11 Plan, in its present form, or as it may be amended or modified in accordance with the Code.

Pro-rata: With respect to any distribution on account of any Allowed Claim, in the same proportion as the amount of such Allowed Claim bears to the aggregate amount of all Allowed Claims of its class.

Secured Claim: An Allowed Claim secured by a lien, security interest, judgment or other charge against or interest in property in which any Debtor or the Debtors have an interest, or which is subject to setoff under Section 553 of the Code, not voidable under any section of the Code to the extent of the value (determined in accordance with Section 506(a) of the Code) of the interest of the holder of such Allowed Claim in the Debtors' interest in such property or to the extent of the amount subject to such setoff, as the case may be.

Washington Partnership: 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Twin Development Corporation, Eleven DuPont Circle Associates and DuPont Land Associates.

Washington Proceeds: The sum of approximately $32,422,798.87, which was received by Gould and certain Gould Entities from the sale of the Washington Properties and which is being held, subject to Court order, in accounts established at Florida National Bank.

Washington Properties: The real and personal property conveyed by the Washington Partnerships pursuant to the Agreement dated July 26, 1984, as amended, by and between the Hadid Investment Group, Inc. and the Washington Partnerships.

II. *SUBSTANTIVE CONSOLIDATION*

Provision for Substantive Consolidation

The Chapter 11 cases filed by the Debtors as Case Nos. 84-01590, 84-01591, 84-01592, 84-01593, and 84-01594 shall on the Effective Date be substantively consolidated pursuant to this Plan and the property of the estates of the Debtors shall be treated as common assets and the Claims of their Creditors deemed Claims against the common assets. As a result of the substantive consolidation of the Debtors, all Claims between and among the Debtors are eliminated by this Plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and MCLP, all claims, if any, relating to or arising out of the Gould FF&E Leases, and all claims of reimbursement, subrogation, and contribution between and among all Debtors.

III. *CLASSIFICATION OF CLAIMS AND INTERESTS*

For the purposes of distribution under this Plan, Claims and Secured Claims of all Debtors are divided into the following classes:

Class 1—Administration Claims as the same are allowed and ordered paid by the Court.

Class 2—The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and at the post-default contract rate thereafter, attorneys' fees, cost and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 3—The Secured Claim of BNY for the BNY Holywell Loan including interest at the pre-default contract rate to August 31, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 4—All Secured Claims other than the BNY Debt and the BNY Holywell Loan, including interest at the rate of 10% per annum and attorneys' fees, as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 5—All Claims which are entitled to priority under Code § 507 as the same are allowed, approved and ordered paid by the Court, including claims for wages, salaries and commissions entitled to priority under § 507(a)(3) and tax claims of governmental units entitled to priority made § 506 and § 507(a)(6), and including interest on such Claims as authorized by applicable law and allowed any ordered paid by the Court.

Class 6—The Claims of all general unsecured creditors, excluding claims of Affiliated Creditors, and excluding the MCJV Claim and the O&Y Claim.

Class 7—The MCJV Claim and the O&Y Claim.

Class 8—The Claims of Affiliated Creditors.

Class 9—The interest of the Debtors which remain after consummation of this Plan.

IV. *MEANS FOR EXECUTION OF THE PLAN*

Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date.

(ii) pay (if requested by BNY, under protest) from such cash the Personal Property Taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the personal property taxes for 1985 due to the Miami Center Closing Date.

(iii) take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center, except those set forth on Exhibit B attached hereto, and except as provided in Article XI hereof. At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result of the merger of such leases effected by the substantive consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP and FF&E covered by such Leases) and would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase option on the Miami Center Closing Date. On the Effective Date all other liens and encumbrances, including the mechanics liens and judgment liens on Miami Center are transferred and shall attach to the Trust Property, including the Washington Proceeds, subject to the security interests of BNY securing the BNY Holywell Loan. All contracts affecting Miami Center that are not to be assumed will be rejected in accordance with Article XI hereof. Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the bal-

ance of the Washington Proceeds will be available for distribution to Creditors.

BNY may elect to retain its mortgages on and security interests in Miami Center after the passing of title; however, upon the passing of title, the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released.

V. *CREATION OF TRUST*

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of § 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

2. On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however*, to all existing liens, mortgages, security interests and encumbrances.

3. Subject to the provisions of this Plan and in order to insure the prompt implementation of the Plan, the Trustee shall have full power and authority to:

(a) Enter into the Contract of Sale and to perform all acts that are necessary or appropriate in accordance with the Contract of Sale;

(b) Perfect and secure his right, title and interest to the Trust Property;

(c) Reduce all of the Trust Property to his possession and hold the same;

(d) Sell and covert the Trust Property to cash and distribute the proceeds as specified herein;

(e) Manage, operate, improve, and protect the Trust Property as specified herein;

(f) Lease or renew leases;

(g) Grant options to purchase and to contract to sell and sell the property owned by the Trust or any part or parts thereof for such purchase price and for cash or on such terms as may be appropriate;

(h) Mortgage, pledge or otherwise encumber the Trust Property or any part or parts thereof;

(i) Exchange and re-exchange the Trust Property or any part or parts thereof for other real or personal property;

(j) Release, convey or assign any right, title or interest in or about the Trust Property;

(k) Pay and discharge any mortgage or other lien or encumbrance against the Trust Property and pay and discharge any other costs, expenses or obligations deemed necessary to preserve the Trust Property or any part thereof or to preserve the Trust;

(l) Improve or repair the Trust Property or any part thereof;

(m) Purchase insurance of all kinds sufficient to protect fully the Trust Property and to protect from liability the Trustee, the Creditors Committees and the employee of any member of the Creditors Committees;

(n) Deposit trust funds and draw checks and make disbursements thereof;

(o) Employ attorneys, accountants, engineers, agents, realtors, rental agents, tax specialists and clerical

and stenographic assistants as may be deemed necessary, at such compensation as the Trustee may deem reasonable;

(p) Take any action required or permitted by this Plan;

(q) Sue and be sued;

(r) Appoint, remove and act through agents, managers and employees and confer upon them such power and authority as may be necessary or advisable;

(s) Invest funds of the Trust in demand and time deposits in any national bank which is an authorized depository for bankruptcy funds in the federal district in which the Trustee resides or to make temporary investments such as short-term certificates of deposit in such bank or treasury bills;

(t) Prosecute and defend all actions affecting the Trust Property;

(u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them, including but not limited to the discontinuances required by the Contract of Sale;

(v) Waive or release rights of any kind relating to the Trust Property or the Debtors or any of them, including but not limited to the releases required by the Contract of Sale;

(w) Deal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any person owning the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter.

(x) Take no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions.

4. In no case shall any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, or to any part or parts thereof, be obligated to see that the provisions of this Plan or the terms of the Trust have been complied with, or be obligated or privileged to inquire into the authority of the Trustee to act, or to inquire into any other limitation or restriction of the power and authority of the Trustee, but as to any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, the power of the Trustee to act or otherwise deal with said properties shall be absolute.

5. The Trustee shall receive reasonable compensation for his services subject to the approval of the Court which fee shall be a charge against and paid out of the Trust Property.

6. All costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property, and the Court, upon being satisfied as to the correctness of any and all such costs, expenses and obligations, shall approve and direct the payment thereof prior to a distribution to the holders of unsecured Allowed Claims.

7. No recourse shall ever be had, directly or indirectly, against the Trustee or any of his agents or employees personally by legal or equitable proceedings or by virtue of any statute or otherwise, it being expressly understood and agreed that all liabilities of the Trustee or such agents are employees or under this Trust shall be enforceable only against and be satisfied only out of the Trust Property.

8. The Trustee shall not be liable for any act or failure to act in his capacity as trustee hereunder while acting in good faith and in the exercise of his best judgment, nor shall the Trustee be liable in any event except for his own gross negligence, willful default or misconduct.

9. The Trustee may resign at any time by giving written notice of his intention to do so addressed to the Court, and such resignation shall be effective upon the date provided in such notice.

10. In case of the resignation of the Trustee, a successor shall thereupon be appointed by an instrument in writing, signed and acknowledged (i) prior to the acquisition of Miami Center by BNY, by BNY and the Creditors' Committee and (ii) subsequent to the acquisition of Miami Center, by the Creditors Committees and delivered to the resigning Trustee, whereupon such resigning Trustee shall convey, transfer and set over to such successor in trust by appropriate instrument or instruments all of the Trust Property then in his possession and held hereunder. Said successor shall thereupon be vested with all the rights, privileges, powers and duties of the Trustee named herein. Each succeeding Trustee may in like manner resign, and another may in like manner be appointed in his place.

11. If BNY or the Creditors Committees at any time desire to terminate the rights of the Trustees then acting under the Trust and appoint a new Trustee in his stead, BNY and the Creditor Committees may do so by a written instrument, addressed to such Trustee then acting; thereupon like conveyances as in the case of resignation of the Trustee shall be made by the Trustee then acting to the newly appointed Trustee, and such new Trustee shall be vested with all the rights, privileges, powers and duties of the Trustee herein named.

VI. *TREATMENT OF CLAIMS AND DISTRIBUTION*

The cash portion of the Trust Property, together with interest thereon, shall be distributed by the Trustee to satisfy the interest of each Class as defined above (other than the BNY Class 2 Claim) in the following manner and order of priority:

1(a). Class 1 Claims are not impaired. As soon as practicable after the Miami Center Closing Date, all allowed Class 1 Claims which have been incurred prior to the Effective Date and which have been approved by a Final Order of the Court shall be paid by the Trustee in full, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such Class 1 Claims in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(b). Class 1 Claims which have been incurred prior to the Effective Date and which have not been approved by the Court on or before the Miami Center Closing Date shall be paid by the Trustee, in full as soon as practicable after the same have been approved by a Final Order of the Court, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such, in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(c). Class 1 Claims incurred subsequent to the Consummation Date shall be paid by the Trustee, in full, as soon as practicable after the same have been approved by the Creditors Committees unless the holder of any such Class 1 Claim shall have agreed to a different treatment of such Claim, in which case the holder of such Class 1 Claim shall be paid in accordance with such agreement.

2. The Class 2 Claim is impaired. The Class 2 Claim consisting of the principal of the BNY Debt and interest thereon at the pre-default contract rate to the Miami Center Closing Date shall be paid and satisfied in accordance with the provisions of Article IV hereof.

3. The Class 3 Claim is impaired. As soon as practicable after the Miami Center Closing Date, the Class 3 Claim consisting of the principal of the BNY Holywell Loan and interest thereon at the pre-default contract rate shall be paid.

4. Class 4 Claims are impaired. As soon as practicable after the Miami Center Closing Date, all Allowed Class 4 Secured Claims shall be paid in full as to principal and shall be paid interest at the rate of 10% per annum.

5. Class 5 Claims are not impaired. As soon as practicable after the Miami Center Closing Date, all Allowed Class 5 Claims shall be paid by the Trustee, in full, in an amount equal to the allowed amount of such Class 5 Claim plus interest, unless the holder of any such Class 5 Claim shall have agreed to a different treatment of such Class 5 Claim, in which case the holder of such Class 5 Claim shall be paid in accordance with such agreement.

6. Class 6 Claims may be impaired if there are not sufficient funds to pay this class in full with interest. As soon as practicable after the Miami Center Closing Date all Allowed Class 6 Claims, after payment of the Allowed Class 1, 2, 3, 4, and 5 claims shall be paid in full or in part Pro Rata.

7. Class 7 Claims maybe impaired. As soon as practicable after the Miami Center Closing Date, and the entry of a Final Order or Judgment resolving the O&Y Arbitration, the Allowed Class 7 Claims will be paid from the MCJV Property, if there is a deficiency the claim will be paid to the extent that funds are available after payment of the Allowed Class 1, 2, 3, 4, 5 and 6 Claims.

8. Class 8 Claims are impaired. As soon as practicable after the Miami Center Closing Date and after the payment of Allowed Class 1, 2, 3, 4, 5, 6 and 7 Claims, all Allowed Class 8 Claims shall be paid in full or in part Pro Rata.

9. Class 9 Claims are impaired. As soon as practicable after the Miami Center Closing Date all Allowed Class 7 Claims, after payment of Allowed Class 1, 2, 3, 4, 5, 6, 7 and 8 claims the residue of the estates shall be paid to the Debtors Pro Rata.

VII. *DISPUTED CLAIMS*

A. *Disputed Claim Fund.* As soon as is practicable after the Miami Center Closing Date, and after payment of the Class 1, 2, 3, and 4 Claims out of Trust Property, the Trustee shall establish the Disputed Claim Fund, in an initial amount reasonably necessary to pay the Debtors' anticipated liability on Disputed Claims.

B. *Investment of Disputed Claim Fund.* The Disputed Claim Fund shall be maintained by the Trustee in a separate bank account, and invested and reinvested at prevailing market rates of interest, for like amounts and periods of investment, pending the determination of the allowed amount of each Disputed Claim.

C. *Distribution from Disputed Claim Funds.*

1. *Distribution on Allowed Portion of Claim.* If a Disputed Claim is allowed, in whole or in part, the Trustee shall distribute to the holder of any such Disputed Claim an amount equal to what the holder of such Disputed Claim would have received on the Effective Date if such Disputed Claim were an Allowed Claim.

2. *Distribution of Cash Deposited in Respect of Disallowed Portion of Claim.* If a Disputed Claim is disallowed, in whole or in part, the Trustee shall distribute to the holders of class of creditors that has not paid in full their Pro Rata share of cash theretofore deposited in the Disputed Claim Fund allocable to the disallowed amount of such Disputed Claim.

VIII. *DUTIES OF THE DEBTORS*

Commencing on the Effective Date and continuing thereafter, the Debtors shall devote such time and attention to the affairs of the estates as are necessary to carry out the provisions of the Plan and to comply from time to time with the reasonable requests of BNY, the Trustees and the Creditors Committees. Without limitation of the foregoing the Debtors shall,

(a) in connection with the sale and transfer of Miami Center as provided in Article IV hereof, take all actions requested by BNY, the Trustee or the Creditors Committees to promptly effectuate the sale thereof, including, without limitations, (i) grant BNY and its attorneys, agents, and accountants full and complete access to the books and records of the Debtors relating in any way to Miami Center and permit BNY to contact any tenants or prospective tenants in Miami Center in connection with the terms and conditions of their occupancy or their proposed occupancy, (ii) deliver to the Trustee, promptly after the Effective Date, all documents required to be delivered to BNY under the Contract of Sale, including but not limited to, all plans specifications, drawings, as built plans and surveys, plans, inventories of all personal property, operating manuals, licenses service and maintenance contracts, and deliver all documents, and supply all information necessary or appropriate to close the Contract of Sale and to effectuate a transfer of title to Miami Center as contemplated by Article IV hereof, and the Contract of Sale.

(b) In connection with the distribution to the creditors of the Washington Proceeds and the implementation of the Plan, take all action and supply all information required of Debtors and/or requested by the Creditors Committees or the Trustee in connection with the prompt and timely prosecution of objections to claims filed against the estates, the prompt and speedy defense of litigation against the estates and the execution of all documents and the performance of all acts as may be necessary or desirable to promptly implement and effectuate the distribution to the creditors of the estates, other than Affiliated Creditors and the overall implementation

of the Plan. The Debtors shall cooperate fully with the Trustee and Creditors Committees and shall grant to the Trustee and Creditors Committees access to and shall permit the Trustee and Creditors Committees to copy all financial statements, tax returns, books and records of every kind as are within the possession, custody-control of any of the Debtors regarding objections to claims against the estate with a view toward the prompt determination of said objections and a prompt consummation of the Plan.

(c) Take any and all actions requested by BNY, the Trustee on the Creditors Committee which are deemed necessary or appropriate by BNY, the Trustee, or the Creditors Committee to implement and perform this Plan, whether or not specifically enumerated herein.

IX. CONDITION PRECEDENT TO THE *EFFECTIVENESS OF THE PLAN*

A. The Effective Date shall have occurred.

X. CONDITIONS SUBSEQUENT TO THE *EFFECTIVENESS OF THE PLAN*

A. The Miami Center Closing Date shall have occurred, in any event, by no later than July 1, 1985, and BNY shall have received by such date the discontinuance and releases required to be delivered to BNY under the Contract of Sale. In the event the conditions subsequent have not been satisfied, at BNY's option this Plan shall no longer be effective, and all obligations and agreements of BNY and its designee shall terminate and be of no effect.

XI. *EXECUTORY CONTRACTS*

A. The executory contracts and unexpired leases listed in Exhibit D and any other existing executory contracts or unexpired leases relating to Miami Center Phase I with any

party not affiliated with any of the Debtors are hereby assumed, unless prior to the Confirmation Date, BNY shall modify this Plan to add or to delete executory contracts or unexpired leases from Exhibit D.

B. Except for executory contracts expressly assumed or rejected prior to sixty (60) days before the date of the Confirmation Order in accordance with 11 U.S.C. § 365, or Paragraph A of this Article all executory contracts and unexpired leases of the Debtors shall be deemed rejected as of the date of the Confirmation Order. Claims for damages resulting from the rejections of executory contracts shall be filed with the Court no later than thirty (30) days prior to the date of the Confirmation Order or be forever barred and precluded from consideration or participation in distributions from the estate. Claims for damages resulting from executory contracts which are deemed rejected as of the date of the Confirmation Order in accordance with this Article shall be filed with the Court or be forever barred and precluded from consideration or participation in distributions from the estate. Objections to any such Claims shall be filed by the Trustee or the Creditors Committees with the Bankruptcy Court within twenty (20) days after the Claim in question has been filed.

XII. *MODIFICATION OF THE PLAN*

BNY may amend or modify this Plan at any time prior to the entry of the Order of Confirmation, pursuant to Section 1127 (a) of the Code. After the entry of the Order of Confirmation, BNY may, pursuant to Section 1127(b) and (c) of the Code and with approval of the Court, modify or amend the Plan in a manner which does not materially or adversely affect the interests of persons affected by the Plan without having to solicit acceptance of such modification, and may take such steps as are necessary to carry out the purpose and effect of the Plan as modified.

XIII. *RESERVATION OF EQUITABLE RIGHTS*

Notwithstanding anything to the contrary contained herein, all rights are reserved to any party-in-interest, by appropriate proceeding, to assert any equitable claim for relief from the substantive consolidation provisions of the Plan if, but only to the extent, such substantive consolidation, materially and adversely affects the rights of such party in interest.

XIV. *RETENTION OF JURISDICTION*

The Court shall retain jurisdiction after confirmation until payments and distributions called for under the Plan had been made and until the entry of final decree, in respect to the following matters:

(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;

(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contingent or unliquidated claims;

(c) to adjudicate all claims or controversies arising during the pendency of the Chapter II cases;

(d) to allow or disallow any claim; and

(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII hereof.

Dated: February 26, 1985, as amended as of March 22, 1985.

THE BANK OF NEW YORK

By: /s/ James Hamilton
Vice President

EMMET, MARVIN &
MARTIN

By: /s/ Thomas F. Noone

48 Wall Street
New York, New York 10005
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STEEL, HECTOR & DAVIS

By: /s/ Vance E. Salter

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ZIEGLER & BARASH, P.A.

By: /s/ S. Harvey Zeigler

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305-538-2851

ATTORNEYS FOR THE BANK OF NEW YORK

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, AND THEODORE B. GOULD, DEBTORS

STIPULATION RESPECTING IMPLEMENTATION OF AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

THE BANK OF NEW YORK (the "Bank"), and the CREDITORS' COMMITTEE of Debtors MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION and HOLYWELL CORPORATION (collectively, the "Committees"), stipulate and agree by counsel as follows:

1. In the event that the Court confirms the Amended Consolidated Plan proposed by the Bank, the "Effective Date" established in the Bank's Amended Consolidated Plan shall be the date of confirmation, provided that the Court has denied any motion for rehearing or reconsideration, and provided that neither (a) the order of confirmation nor (b) any order denying rehearing or reconsideration has been stayed by any court.

2. In the event of any conflict between the Contract of Purchase attached to the Bank's Plan and the terms of the Plan itself, the terms of the Plan shall govern, provided

that the resolution of such conflict does not adversely affect the title to the Miami Center project to be acquired by the Bank under its Plan.

3. The Bank agrees that any money realized as a result of the tax protests, presently in process for the prior years, shall be added to the fund for the payment of other creditors, provided that the Bank shall be permitted to make the determination to dismiss or settle any such tax protest suits or claims in the event the Bank determines in its sole judgment that it is in the best interest of the Bank to do so.

4. The Liquidating Trustee to be appointed by this Court under the Bank's Plan shall be directed by this Court (a) to pay all "Undisputed Claims" as set forth in an order of this Court, immediately after title to the Miami Center project is vested in the Bank or its nominee pursuant to the Contract of Purchase attached to the Bank's Plan (on or before a date forty-five (45) days after the Effective Date), and (b) to pay all Allowed Claims with interest at the full legal rate, if available in the liquidating fund, provided that such interest shall be paid 90 days after the payment of the principal.

5. The Holywell creditors are entitled to distribution from Holywell assets before distribution from such assets to creditors of other Debtors, and distribution to the Holywell creditors under the Bank's Plan shall be made from the Holywell assets prior to distribution from such assets to creditors of the other Debtors. Such distributions in respect to Undisputed Claims shall be made as provided in Paragraph 4 above, and a fund shall be established by the Liquidating Trustee as a reserve fund for disputed claims. As such disputed claims are allowed, they shall be paid for from such fund.

6. In consideration of the approval of this stipulation by the Court and the entry of an Order to that effect, the

Committees shall withdraw objections to confirmation of the Bank's Plan shall encourage and advise their respective members to vote in favor of that Plan.

7. This stipulation shall terminate in the event, and at such time as, the hearing on confirmation of the Bank's Plan is delayed beyond May 31, 1985.

This stipulation is respectfully submitted for approval by the Court and shall become effective as of the date so approved.

THE BANK OF NEW YORK

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407 Lincoln Road
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(305) 538-2531

By: /s/ [S. Harvey Ziegler]
S. Harvey Ziegler, Esquire

CREDITORS' COMMITTEES OF
MIAMI CENTER LIMITED PARTNERSHIP and MIAMI CENTER CORPORATION

HOLLAND & KNIGHT
1200 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

By: /s/ Irving M. Wolff
IRVING M. WOLFF, ESQUIRE

CREDITORS' COMMITTEE OF
HOLYWELL CORPORATION

BLANK, ROME, COMISKY & McCAULEY
4770 Biscayne Boulevard
Miami, Florida 33137
(305) 573-5500

By: /s/ Joel M. Aresty
JOEL M. ARESTY, ESQUIRE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

SECOND AMENDMENT TO AMENDED CONSOLIDATED PLAN OR REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

The Bank of New York hereby amends its proposed Amended Consolidated Plan of Reorganization as follows:

1. Add to Article I the following definitions:

"*BNY Funding Agreement:* BNY's agreement to advance to the Trustee up to $14,417,679, in substantially the form of Exhibit E attached hereto."

"*Trustee's Certificate*: The Trustee's Certificate of indebtedness to BNY under the Funding Agreement, in substantially the form of Exhibit F attached hereto."

2. Amend Article III, "*Class 1*" [page 14], to read:

"*Class 1*—Administrative Claims, as the same are allowed and ordered by the Court, and liabilities of the Trustee under any Trustee's Certificate."

3. Add to Article IV, subparagraph (b) (iii) [page 18] the following:

"On the Miami Center Closing Date, BNY agrees to execute and deliver to the Trustee the BNY Funding Agreement."

4. Add to the last paragraph of Article IV [page 19] the following:

"Notwithstanding anything herein contained to the contrary, the liability of the Trustee and the Debtors to BNY under any Trustee's Certificate(s) shall survive the passing of title."

5. Add to Article V, subparagraph (3) [page 24], the following:

"(y) borrow from BNY as contemplated by the BNY Funding Agreement and issue Trustee's Certificates to evidence such borrowing."

6. Change the date in Article X [page 36] from July 1, 1985 to September 15, 1985.

Dated: July 30, 1985

THE BANK OF NEW YORK, by its undersigned attorneys:

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THERREL BAISDEN & MEYER WEISS
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4000 Southeast Financial Center
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(305) 577-2800

By: /s/ Vance E. Salter
VANCE E. SALTER

EXHIBIT E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 Proceedings

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

FUNDING AGREEMENT

Agreement made this _____ day of _____, 1985 between The Bank of New York ("BNY") and _____ as Trustee.

BACKGROUND

BNY filed a Consolidated Plan of Reorganization in the captioned proceedings on February 26, 1985, which was amended on March 22, 1985. BNY's plan contemplated the acquisition by BNY for $255,600,000 of the Miami Center Project, which includes an office building hotel, podium, all furniture, fixtures and equipment ("FF&E") used therein, together with the land upon which such improvements are located. Pursuant to two lease agreements dated May 14, 1981 (the "MCJV FF&E Leases"), Miami Center Joint Venture ("MCJV"), a joint venture consisting of debtor Theodore B. Gould ("Gould") and Olympia & York Florida Equity Corp. ("O&Y"), leased certain FF&E

to debtor Miami Center Limited Partnership ("MCLP"). BNY's Amended Plan of Reorganization required MCLP to deliver title to the FF&E covered by the MCJV FF&E Leases to BNY free and clear of all claims of MCJV.

O&Y on behalf of MCJV filed a claim in the captioned proceedings in connection with the MCJV FF&E Leases on December 20, 1984. On July 3, 1985 MCJV (with the approval of Gould and O&Y) filed a claim in connection with the MCJV FF&E Leases in the total amount of $14,417,679; that claim was intended to supersede the earlier claim (the MCJV FF&E claim as so superseded is hereinafter called the "MCJV FF&E Lease Claim"). BNY's Amended Plan of Reorganization classified the MCJV Lease Claim as a Class 7 claim, subordinate in right of payment to all third-party creditor claims (Classes 1 through 6). Objections were filed on behalf of MCJV to the proposed classification. BNY has filed Objections to the MCJV FF&E Lease Claim. In addition, BNY maintains that the MCJV FF&E Leases are not "true leases", but are instead financing agreements. By judgment entered July 17, 1985, from which an appeal has been taken by BNY, the Bankruptcy Court determined that the MCJV FF&E Leases were "true leases".

BNY filed a Second Amended Consolidated Plan which, among other things, provided for the execution and delivery of this Funding Agreement to enable the Trustee to deliver the FF&E covered by the MCJV FF&E Leases to the Bank or its designee. BNY's proposed plan as so amended is hereinafter called "BNY's Amended Plan". BNY's Amended Plan was confirmed by Order dated ____, 1985 and the Trustee was appointed pursuant to the Amended Plan by Order dated ____, 1985.

NOW THEREFORE, in consideration of the premises, the parties agree as follows:

1. If a Final Order (as defined in BNY's Amended Plan) is entered determining that the MCJV FF&E Lease Claim is entitled to payment prior to or concurrently with the Class 1 through Class 6 creditors' Allowed Claims as set forth in BNY's Amended Plan, BNY will advance to the Trustee, within 10 days after written request therefor, the difference between the amount of such claim as determined by that Final Order and the amount of funds available to the Trustee after payment to, and/or provision for, all Allowed Claims in Classes 1 through 6 of BNY's Amended Plan which were filed by the bar date (January 15, 1985). In no event shall BNY be required to advance more than $14,417,679 (the "Commitment Amount") hereunder. The Commitment Amount shall be reduced by the amount of any payments made by the Trustee from time to time in respect to the MCJV FF&E Lease Claim.

2. If a Final Order is entered determining that the MCJV FF&E Lease Claim has been properly classified in BNY's Amended Plan (as junior in priority of distribution to the Allowed Class 1 through Class 6 creditors), BNY shall have no obligation to advance any funds hereunder, and this Funding Agreement shall terminate.

3. The Trustee shall issue to BNY a Trustee's Certificate in substantially the form attached as Exhibit E, to evidence any funds advanced by BNY hereunder. The Trustee shall repay BNY from available funds and assets remaining in the debtors' estates, as set forth in the Trustee's Certificate.

4. Unless the context otherwise requires, all other terms used herein shall have the same meanings as set forth in the BNY's Amended Plan.

In Witness Whereof the parties hereto have caused the Funding Agreement to be executed this _____ day of _____, 1985.

THE BANK OF NEW YORK

By: _____
Vice President

By: _____
_____, as Trustee

EXHIBIT F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 PROCEEDINGS

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

CERTIFICATE OF INDEBTEDNESS
OF _____, TRUSTEE

For value received _____, as Trustee (the "Trustee") of the Miami Center Liquidating Trust (the "Trust"), under the Consolidated Plan of The Bank of New York, dated February 26, 1985, as amended by First Amendment to Plan, dated March 22, 1985, and as amended by Second Amendment to Plan, dated July 30, 1985, (the "Plan"), promises to pay to the order of THE BANK OF NEW YORK, at its office at 48 Wall Street, New York, New York 10005 ("BNY") the sum of _____ ($_____), together with interest thereon from the date hereof to the date of payment at BNY's Prime Rate plus one percent (1%) per annum. "Prime Rate" shall mean the prime commercial lending rate of The Bank of New York as publicly announced to be in effect from time to time, such rate to be adjusted on and as of the effective date of any change in the Prime Rate. Such Prime Rate is

not necessarily the lowest lending rate offered by BNY to its customers from time to time. All interest based on the Prime Rate shall be calculated on the basis of a 360 day year for the actual number of days elapsed. Principal and accrued interest thereon shall be paid as and when funds are available to the Trustee from the liquidation of the debtors' estates.

Unless otherwise defined herein all capitalized terms used in this Certificate shall have the meaning set forth in the Plan.

This Certificate of Indebtedness is the Trustee's Certificate referred to in, and is issued pursuant to, the Plan and the Funding Agreement, and has been issued pursuant to the Order of Confirmation, dated _____.

The obligation of the Trustee under this Certificate is a Class 1 Claim and is entitled to priority in payment under Code Section 507 over all other claims, except (i) Class 1 Claims that have been paid or allowed prior to the date hereof and (ii) Allowed Class 2 through Class 6 Claims that were filed on or before January 15, 1985, together with allowed Trustee's fees and expenses.

In order to secure the obligations of the Trustee under this Certificate and to provide BNY with adequate protection, the Trustee, on behalf of the Trust, grants to BNY a first lien and security interest in all of the Trust Property and proceeds thereof, including without limitation all right, title and interest of the Trustee in the Award, in MCJV, and the proceeds thereof. The Trustee agrees to execute all such security agreements, financing statements, or other instruments as may be reasonably required by BNY in order to evidence or perfect such lien and security interest.

This Certificate shall be binding upon and inure to the benefit of the respective successors and assigns of each of the parties, including a Trustee in a superseding Chapter 7 case.

This Certificate shall be governed by and construed in accordance with the laws of the State of Florida and the Code.

In witness whereof, the Trustee has executed this Certificate on this _____ day of _____, 19____.

MIAMI CENTER
LIQUIDATING TRUST

By: _____
Trustee

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
JUDGE SIDNEY M. WEAVER

No. 84-01590-BKC-SMW

In the Matter of:

HOLYWELL CORPORATION, ET AL., DEBTORS

No. 87-0627-BKC-SMW-A

FRED STANTON SMITH, PLAINTIFF

vs.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

MOTION FOR AN ORDER REQUIRING COMPLIANCE BY THE DEBTORS WITH SECTION VIII OF THE AMENDED CONSOLIDATED PLAN OF REORGANIZATION; MOTION FOR RECONSIDERATION OF COURT'S RULING CONCERNING PRODUCTION OF TAX RETURNS and MOTION FOR RECONSIDERATION OF 2-9-88 ORDER ON MOTIONS.

February 11, 1988

The above-entitled cause came on for hearing before the HONORABLE SIDNEY M. WEAVER, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court on Tuesday, February 11, 1988, commencing at or about 1:00 p.m., and the following proceedings were had:

REPORTED BY: Jaclyn M. Ouellette

APPEARANCES:

HERBERT L. STETTIN, ESQUIRE, AND
PAMELA STETTIN, ESQUIRE,
Attorneys for the Liquidating Trustee,
Fred Stanton Smith.

COLL, DAVIDSON, CARTER, SALTER & BARKETT, BY
FRANCIS L. CARTER, ESQUIRE, AND
JANIE ANDERSON, ESQUIRE, AND
KIRKPATRICK & LOCKHART, BY
S. HARVEY ZIEGLER, ESQUIRE, AND
TOM NOONE, ESQUIRE,
Attorneys for The Bank of New York.

STEARNS, WEAVER, MILLER, WEISSLER, ALHADEFF & SITTERSON, BY
KEVIN ORR, ESQUIRE, AND
ROBERT MUSSELMAN, ESQUIRE,
Attorneys for Corporate Debtors.

UNITED STATES DEPARTMENT OF JUSTICE, BY
FRANK DELEON, ESQUIRE, AND
TERRY MITCHELL, ESQUIRE,
Attorneys for Internal Revenue Service.

KOZYAK, TROPIN & THROCKMORTON, BY
JOHN W. KOZYAK, ESQUIRE,
Attorneys for O&Y.

ALSO PRESENT:

THEODORE B. GOULD, IN PROPER PERSON.

FRED STANTON SMITH, LIQUIDATING TRUSTEE.

WITNESSES:

	Direct	*Cross*	*Redirect*
DONALD ANDERSON DENKHAUS:			
By Mr. Stettin	54	–	–
By Mr. Gould	–	65	–
By Mr. Musselman	–	74	–
CLIFFORD BENSON:			
By Mr. Stettin	76	–	–
By Mr. Gould	–	82	–
FRED STANTON SMITH:			
By Mr. Stettin	86	–	96
By Mr. Gould	–	87	–
By Mr. DeLeon	–	94	–

EXHIBITS:

Plaintiff's Exhibit Number 1 58
Plaintiff's Exhibit Number 2 60
Plaintiff's Exhibit Number 3 61
Plaintiff's Exhibit Number 4 63
Plaintiff's Exhibit Number 5 79
Plaintiff's Exhibit Number 6 85
Plaintiff's Exhibit Number 7 89
Plaintiff's Exhibit Number 8 91
Plaintiff's Exhibit Number 9 97

Debtor's Exhibit A 71

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[4] THE COURT: Yes, sir.

MR. STETTIN: Your Honor, you have two matters set on the 1 O'clock calendar. One of them is relatively brief. The other one is the adversary.

With your permission, I think we ought to take the relatively brief one. We can dispose of that.

THE COURT: I have also put some more motions on the calendar that were pending and I felt we might as well dispose of them today. Motion for Reconsideration of Court's Ruling Concerning Production of Tax Return, Motion For Reconsideration of 2-9 Order On Pending Motions. Mr. Mark filed that.

I am not sure that these people got notice of them being on the calendar today. They should have. Telephone notice was given by the Clerk's Office for these people.

MR. STETTIN: We did not receive notice of either one of those being on. I will tell you that Mr. Edelman and Mr. Kozyak filed one of those motions and I don't see him here.

MR. ZIEGLER: We reached an agreement on that this morning. I spoke to Mr. Edelman on the telephone and nothing is going to come up in the adversary that disturbs either of us, so that motion can be taken off to see if it ever has to be addressed.

[5] THE COURT: Well, of course, the Court tries to accommodate lawyers and other people, who just walked out of the courtroom, but I frown on people who take advantage of the Court to the extent that they say, Judge, can we get this on an expedited manner. Sure, I will do it, and then they don't show up.

MR. ZIEGLER: Mr. Edelman was in New York, in deference to him.

THE COURT: I don't care if he is on the moon. He was available for framing that motion.

MR. ZIEGLER: I am on the other side, Your Honor.

THE COURT: I know you are.

MR. GOULD: Your Honor, Mr. Edelman called me and informed me that the bank had in fact agreed to accept the K-1 provided by the joint venture for me, and I said under those circumstances, that it didn't appear to me worth while to waste the Court's time in dealing with some emergency motions for reconsideration.

THE COURT: Well, that's good, and that is probably a practical solution, but you would be surprised how many times a practical solution turns into trauma and we lose motions in the cracks and people say, Judge, you never heard this and we never reached an agreement, so therefore the policy of the Court, and [6] Kozyak's firm knows this and I will deal with Mr. Kozyak, is that when you ask for something as a special favor, great, the Judge will usually give it to you, but certainly be professional enough to appear in Court and tell him on your own accord, not through third parties, that you are in accord. Judge, this can be removed because it has been resolved, and Mr. Kozyak and Mr. Edelman, whoever he is—is he with Kozyak's firm?

MR. STETTIN: No, he is a New York lawyer. Mr. Kozyak appears as local counsel for their joint client.

THE COURT: I don't know anything about that.

Anyway, Kozyak filed the papers and I will have to deal with him. I don't say that vengefully. I am just making a statement.

How about the motion for reconsideration of the 2-9 order on pending motions by Mr. Mark?

MR. MUSSELMAN: Your Honor?

THE COURT: Again, a courtesy to get this on the calendar on an expedited basis.

MR. MUSSELMAN: Mr. Mark is out of town. Mr. Orr from his office was here a few minutes ago, but as lead

counsel, perhaps Your Honor will permit me to address the matter with Mr. Orr's absence?

[7] THE COURT: Do you know enough about it, counselor?

MR. MUSSELMAN: I think so.

THE COURT: I am not disputing your knowledge, but do you know enough about this motion to present it?

MR. MUSSELMAN: I believe so, Your Honor.

THE COURT: All right, sir. Let's proceed.

MR. MUSSELMAN: This is a motion requesting the Court's further consideration of the decision reached on Tuesday, I believe it was, where Your Honor granted and denied a whole group of motions that most of which we had not realized would be on the calendar for that day.

The particular request for reconsideration brings us to the objection by the discharged debtors to many of the points that were in the original thing on the basis that under the Bankruptcy Code, we believe that the matters addressed here are strictly post-confirmation and not within the scope of the continued jurisdiction of this Court.

That is our basic problem here. It's a problem that has run through many of these hearings and it maybe that Your Honor feels he has already addressed it adequately, but it is a matter we feel of very great [8] importance.

Of course, the whole status of this case has gotten terribly confused.

MR. MUSSELMAN: Yes, Your Honor.

It is particularly confused in the fact that the order of confirmation, which is what everyone seems to be relying on, was specifically reversed by Judge Atkins so that we have a case where the order of confirmation was affirmed by Judge Aronovitz and reversed in express terms by Judge Atkins, and this creates a problem and it runs through everything else that we do.

THE COURT: Counsel?

MR. STETTIN: Your Honor, I did not realize we were going to be doing Genesis again.

Why are we back at the very beginning of this case?

The motion addresses an order you entered on the 9th and says in support of it that it should not have been granted because this Court lacks jurisdiction over the entire controversy, and you have already passed on that several times; the order directs the production [9] of documents that have no bearing on the present controversy, you passed on that directly and specifically, Mr. Keven Orr argued that directly before you on the 9th; and third, the order does not give them enough time.

In fact, they have partially complied with it by sending some documents. They have not complied completely by sending all of them.

I will tell you that we are prepared to go forward with the adversary today even with the incomplete production and will deal with the need for more production if needed, but on its merits, the motion for reconsideration ought to be denied.

THE COURT: Denied.

MR. STETTIN: The next one, Judge, is the—

MR. GOULD: Have you denied it, Your Honor?

THE COURT: Yes, sir.

MR. GOULD: Fine. Thank you.

MR. STETTIN: The next one is the motion which was filed by the liquidating trustee for an order requiring compliance by the Debtors with Section VIII of the Amended Consolidated Plan Of Recognition.

The motion itself was filed February 3rd. I have not received a response formally other than the [10] letter which is attached to the motion.

The motion asks that the Court require the debtors to provide the cooperation which the plan absolutely requires

of them, and Section VIII of the plan,it says that commencing on the effective date and thereafter, the debtors are to devote such time and attention to the affairs of the estates as are necessary to carry out the provisions of the plan and with the reasonable requests of the trustee, and among the things that they are required to do is to cooperate fully with the trustee and give the trustee access to and permit the trustee to copy all financial statements, tax returns, books and records of every kind as are within the possession, custody and control of the debtors regarding objections to claims against the estate, with a view toward the prompt determination of the objections and a prompt consummation of the plan.

It happens to have direct relevance to the problem that we have got today, and that is the question of whether or not the liquidating trust has any obligations at all concerning income taxes. We need to have complete records, one way or the other.

We sent a letter—I did—I sent a letter on December 31st, 1987, to Mr. Gould, directed to him both individually and as an officer, stockholder and [11] controlling party of each of the debtors, asking for six categories of documents, and I concluded by saying the information is sought pursuant to the continuing obligation of the debtors to provide financial information and to take all actions requested by the trustee, which he deems appropriate to implement and perform the plan.

He responded within a week in which he said, among other things, that he wasn't going to comply; that the Court lacked jurisdiction over him, these matters were no longer subject to any control by the liquidating trustee, and he would not comply.

His letter is attached to the motion. I don't mean to paraphrase it but I believe that is the thrust of it. He won't comply and he has consistently taken the position, neither

this Court nor any other Court in this District, nor the liquidating trustee, least of all, has any authority over him.

He is wrong and the Court ought to order him to comply.

MR. GOULD: Mr. Stettin is the first person in this proceeding who has accused Holywell, myself and the Miami Center Limited partnership of not cooperating under Article VIII or not cooperating with the trustee. [12] He read Article VIII to you him. Financial records have in fact been provided to the trustee and those records are specifically related to the resolution of claims. We not only provided all the the records, we segregated the records that were down here in Miami and they were given the opportunity to go through all of the books and records in Charlottsville, Virginia.

Mr. Stettin is continuing this process as one of harassment. I don't have anymore patience for it.

I have nothing to give Mr. Stettin that is available at the present time.

MR. STETTIN: For Mr. Gould to say that he does not have the documents, leave aside his gratuitous–

MR. GOULD: That's not what I said. Jesus, I have got to leave this place.

THE COURT: Sit down, Mr. Gould.

Proceed.

MR. STETTIN: I don't want to misquote him, Judge. If the reporter would simply read back his very last sentence, we can resolve this.

THE COURT: All right, read it back, Ms. Reporter. [13] (Whereupon, the sentence referred to was read back by the Court Reporter.)

MR. STETTIN: Let me read you some of the categories of documents that I had asked for. The location

and person in control of the corporate stock of each of the subsidary companies of Holywell Corporation. He can tell me whether or not he knows where they are. He knows where they are, Judge.

Current financial statements which schedule all of the assets and liabilities for each of the subsidiary corporations of Holywell Corporation, the most recent operating statements for each of the subsidiary corporations of Holywell Corporation.

Please keep in mind, Judge, they hâve a full time financial officer who works for Holywell Corporation named Edgar Shomaker, whose job it is to handle the financial affairs of these companies.

Four, a description of each asset owned by the subsidiary corporations of Holywell Corporation, including each bank account, certificate of deposit or other evidence of indebtedness due the subsidiary company.

Five, a statement of all your assets and liabilities including the name and address of each bank account or other evidence of indebtedness due you.

[14] Six, the disposition of the settlement proceeds received by Holywell Telecommunications Company from a case that lately pended in the Circuit Court in Dade County. I know personally that they got $485,000 in cash no earlier than November of 1987. I would just like to know the disposition of it, since it is owned by a wholly-owned subsidiary of Holywell.

I don't accept and I don't think the Court should accept Mr. Gould's statement that he has nothing that he can or will make available to the trustee.

MR. GOULD: At closing, the trustee was given by the Bank of New York all certificates of all the subsidiaries that have been previously issued, including Holywell checks. They were at the same time given all the financial statements prepared by Touche Ross.

They have been given the 1983, 1984, 1985 tax returns and those tax returns are consolidated returns with balance sheet for each individual subsidiary. Touch Ross' financial statements for 1983 and 1984 for the Miami Center Limited Partnership and Chopin Associates, the tax returns for Chopin Associates, also shows the information that was requested by Mr. Stettin.

Now, if Mr. Stettin's is asking for my bank [15] accounts now, for my personal bank accounts now, I do not think that I am within Mr. Stettin's purview. I do not think Mr. Stettin continues to control my conduct as a discharged debtor.

If you are going to say to me that I am not a discharged debtor, I will provide the information to Mr. Stettin. If you say that you propose to revoke, as I understand you suggested, the discharge of the debtors, if that is feasible under the Code, please do it and I will provide the information to Mr. Stettin, but the only thing that Mr. Stettin is requesting that he does not have is, one, my personal bank account, and, two—excuse me, three things—two, my returns for 1983 and 1984, 1985 and 1986. There is a specific reason for that. Those returns have to be adjusted for 1985.

Three, the disposition of an asset of a non-filed affiliated company of a discharged debtor, Holywell Corporation.

If you are saying that Holywell Corporation has not been discharged, then I will also provide him with that information.

MR. STETTIN: I have only one comment, Judge. Mr. Gould seems to believe that from and after the time of confirmation, he has no continuing obligation at all to provide current financial [16] information or otherwise. I think he is wrong. I think this Court has already deter-

mined that in a number of other instances. This is simply one more instance.

THE COURT: Your position on Mr. Gould being a discharged debtor, of course, is he is a discharged debtor.

MR. STETTIN: Yes, sir.

THE COURT: Apparently the word got back to you, Mr. Gould, as I would expect it to, you have attorneys and they report back to you, I had no idea that this motion to comply, to require compliance was on the calendar for today. I don't have the luxury of reviewing my calendars for a week in advance.

I made the observation the other day, based upon the numerous hearings that we have and the reluctance of cooperation from all parties, and I say that all inclusive, perhaps I should restrict it to some parties, to comply so we can get this case on the road.

It seems to me that there is a provision or might be a provision, and I don't know if it has ever been tested or not, that if there is a provision within the plan itself, a confirmed plan, for compliance so that this matter can be wrapped up, that failure to comply by a discharged person might result in a revocation of that discharge. I don't know if it does [17] or not. This was my remark the other day in Court and I had no idea that this motion was going to be on the calendar today.

I would say so that we can proceed with the matter that primarily confronts us, with an aside to Mr. Kozyak in a moment, that pursuant to the provision of the appropriate named numbered article that you recited in Court today, persons which are effected by this article will cooperate with other parties as appropriate, so that this case might be concluded as expeditiously as possible.

Now, we get into a situation, failure to do that results in a violation or disobedience of a Court order, and then of course we have a new ballgame.

Draw that.

MR. STETTIN: I will, sir.

THE COURT: Mr. Kozyak?

MR. KOZYAK: I apologize for being late.

MR. STETTIN: Excuse me for just one second.

Would you set a time limit within which compliance should occur so we have a date from which we can act?

THE COURT: Let's use the word forthwith as to all future requirements. I can not set a date today [18] for something that might come up later down the line. Forthwith.

MR. STETTIN: Yes, sir.

MR. GOULD: Your Honor, I believe that we have complied.

THE COURT: Mr. Gould—

MR. GOULD: I have fully complied.

THE COURT: I am not holding you in contempt of the Court's order. I'm just making a general statement.

MR. GOULD: I want you to know, we have complied with Article VIII of the plan of reorganization.

THE COURT: Okay.

MR. STETTIN: Respectfully, he has not.

THE COURT: This is not before the Court today. This is just a matter that the Court is going to set a policy.

You have to recognize, people, that you folks have been discussing this case for a number of years. I have been listening to discussions for a relatively short time.

THE COURT: Mr. Kozyak?

MR. KOZYAK: Your Honor, I was not here forthwith and I apologize.

[19] THE COURT: Mr. Kozyak, the Court has to impose the same type of a situation on you that it would for somebody else coming in.

MR. KOZYAK: I am familiar with the Court's penalty.

THE COURT: You have a favorite charity, of course.

MR. KOZYAK: I have developed several since I started appearing before this Court.

THE COURT: Right. Well, you have diversified your activities and I give you credit.

MR. KOZYAK: I am diversified.

THE COURT: Send $15 to your favorite charity with a copy of the transmittal letter to me.

MR. KOZYAK: I have it in my briefcase. Thank you, Your Honor.

THE COURT: Now, in regard to your motion for reconsideration of the Court's ruling concerning the production of tax returns, Mr. Ziegler said, Judge, we have resolved this.

I said, fine, I am glad, but the policy of the Court, and I am really taking up your time and my time of repeating what I said previously, is that if the Court gives you the courtesy of putting it on the calendar on an expedited basis, then I expect for you to [20] reciprocate with the courtesy of showing up and saying, Judge, we have resolved this.

MR. KOZYAK: Absolutely, I do apologize.

It's not an excuse but I was waiting for this proposed order to be run off and I should not have waited. Mr. Ziegler and I have and will be submitting an order.

THE COURT: Just come into Court and say, Judge, we have resolved that. I would accept your word.

MR. KOZYAK: Thank you.

THE COURT: Would you draw me an order, then, John?

MR. KOZYAK: I have it but I will need to revise it just a little to satisfy Mr. Ziegler.

THE COURT: The effect is that you will withdraw it?

MR. KOZYAK: It's dismissed as moot.

THE COURT: Dismissed as moot?

MR. KOZYAK: Yes, sir.

THE COURT: Mr. Stettin, would you be kind enough to draw me the order on the reconsideration?

MR. STETTIN: I will.

THE COURT: As to the motion for an order requiring compliance, the Court would deny that without prejudice and with the general order requiring [21] compliance by all parties effected under Article VIII or VI, whatever it is.

MR. STETTIN: Article VIII.

THE COURT: It was a Section 8 in the service, wasn't it, Mr. Carter?

MR. CARTER: Your Honor, I understand that some people were discharged under that section, yes, sir.

THE COURT: I wondered if you would remember, or by the very nature of the article, you do not remember.

(Laughter.)

THE COURT: All right, then, Let's proceed.

MR. STETTIN: Yes, sir.

Your Honor, the matter which was scheduled for today is the adversary complaint filed by the trustee, Adversary Number 87-9627. It's commonly known among all of the participants in this proceeding as the tax adversary.

This is an adversary proceeding brought by the trustee to determine several issues.

First, whether or not the estate, that is the liquidating trust, has any obligation to file tax returns for income which it received during the pendency [22] of these proceedings and, second, if it does, whether it has the obligation to pay tax. If it does, to determine the amount of that tax.

The named defendants in this case are the debtors; we contend that they are obligated to file and to pay the tax; The United States of America, through the Internal Revenue Service, and the Bank of New York.

The reason the Bank of New York is named is very specific. They were the proponent of the amended con-

solidated plan of reorganization, they were the major influence behind its having been accepted by the Court, they issued an indemnification to the trustee at the time of the conveyance by the trustee of the trust interest in the Miami Center property, agreeing to indemnify him as a result of any claims that might arise from him doing so, and there may be some tax liability, we think not, but there may be some tax liability from that transaction.

In addition, we have also added a claim in there that if there is any tax liability, it is in fact the result of wrongful acts on the part of the Bank of New York since they were the proponent of the plan, they did prepare and circulate the disclosure statement, and both of those documents did not take into account, simply did not raise the question of whether there was [23] and, if so, how much, tax liability as a result of the transactions involved.

With the Court's permission, I am going to give you a very brief overview of the issues that make this dispute.

THE COURT: Will you include the tax years that we are talking about?

MR. STETTIN: I am going to now.

THE COURT: All right.

MR. STETTIN: The debtors filed their petitions I believe in August of 1984. Just before they filed, one or more of the debtors had enterd into contracts to sell property which they had an interest in and which another wholly-owned non-filed subsidiary called Twin Development Corporation had an interest in located in the Washington, D.C. area.

Everyone refers to it familiarly as the Washington proceeds, sale from Washington property.

The debtors, as debtors in possession, asked the Bankruptcy Court during the pendency of the Chapter 11 proceedings for permission to complete that sale. Permis-

sion to complete that sale. Permission was granted. The sales were completed partially in December of 1984, partially in January of 1985.

The order which Judge Britton entered [24] authorizing the completion of the sales which were payable to the debtors and to Twin Development corporation, wholly-owned non-filed subsidiary of Holywell Corporation, would be brought down and kept in a separate bank account or bank accounts, in the nature of certificates of deposit or treasury bills or something like that, subject to the further order of the Court.

The Bank of New York thereafter, on motion, obtained an order saying that those accounts were subject to a cash collateral lien in favor of the Bank of New York. Thereafter, the Bank of New York proposed a plan of reorganization which included in part the use of those Washington proceeds, including the portion of them that were owned and attributable to the debtors—I think they were Holywell Corporation and Mr. Gould invidually—as well as the portion of those Washington proceeds which were the property of Twin Development Corporation, as its share of that sale.

The disclosure statement said that. The Internal Revenue Service was a party to these proceedings. They had prepetition claims.

I would assume in the ordinary course, and I don't think they'll deny this, that they received a copy of the proposed plan of reorganization and the [25] disclosure statement. Neither the plan nor the disclosure statement said anything at all about the payment of income taxes which might come due as a result of that sale, the Washington proceeds.

In fact, the Internal Revenue Service not only was a prepetition creditor but attempted to assert additional claims during the pendency of the Chapter 11 proceedings. Those

claims were late filed, they were beyond the bar date and were striken by Judge Britton.

It happens that that order was affirmed on appeal and there is presently pending a notice of appeal in the Eleventh Circuit by the Internal Revenue Service. Those claims have nothing to do with these claims for arising out of the Washington proceeds.

The plan also provided another use of funds which directly affects today's proceedings. The plan said that they were going to sell the Miami Center property for $255,600,000, the amount that it had been appraised at in an M.A.I. appraisal. It would be sold to the Bank of New York or its nominees.

No provision was made in the plan or in the disclosure statement for any income taxes that would become due, if any were to be become due, and payable to the Internal Revenue Service as a result of this sale. The Internal Revenue Service received a copy of this [26] plan and this disclosure statement.

The order of confirmation of that plan of arrangement was entered. It was appealed. Judge Aronovitz sent it back for findings and conclusions.

On remand, it was again confirmed and as confirmed on remand, was again appealed. This time it was affirmed, and you will recall, of course, that the Eleventh Circuit has since dismissed that appeal because the plan was substantially consummated.

The substantial consummation arose in the following manner. When the plan became effective, there was a brief period of time after the order of confirmation was entered, during which a stay remained in effect. The Debtor did not post a supersedeas which the Bankruptcy Court and later the District Court modified, had scheduled.

The plan became effective, I believe the date was October 10, 1985. The liquidating trustee, named by the

Court as a result of the order of confirmation to operate the liquidating trust, took over on October 10th. Almost instantly, he attended the closing and conveyed the estate's interest, the liquidating trust's interest in this property to the Bank of New York's nominee.

He did not operate the property at any [27] time. He did not engage in the business of operating the hotel or the office building or any of the other properties. He simply executed the instruments of conveyance on behalf of the liquidating trust and received the net proceeds, some of which were put into an escrow account at Holland & Knight concerning the ad valorem taxes you will recall we had discussions about recently, and some were simply conveyed to him and placed in bank accounts in his name.

The Washington proceeds were also placed in bank accounts. I think they may have been in the form of certificates of deposits or treasury bills, but they were in fact held to be used for the purposes of the plan.

Shortly thereafter, toward the end of 1985, beginning of 1986, the trustee began paying off all of the creditors. To do that, he issued instructions to I think it was Florida National Bank where these funds were kept, saying I want you to you honor these checks that I am going to be drawing to all of these creditors.

Mr. Gould objected and said to the bank, to Florida National, you don't honor the checks drawn which are going to be paid against the Twin Development proceeds, the Washington sale proceeds. They are not the property of the liquidating trust.

[28] An emergency hearing was brought by Mr. Wolff, who was then representing the liquidating trust to determining this and have Mr. Gould held in contempt for interferring in the administration of the liquidating trust.

Judge Britton entered an order in which he said the monies all belong to the liquidating trust. Mr. Gould, you have no authority over them.

That order was appealed. Judge Ryskamp affirmed that order, finding that the debtor had been equitably estopped from denying this because in its own pleadings filed with the Court, it had said all these monies would be used to pay the creditors of Holywell and its affiliates.

Remember, please, that there was an order of substantive consolidation of all of the debtors that had been entered.

That order from Judge Ryskamp, just to bring you up to date, was appealed to the Eleventh Circuit, oral argument was held approximately two weeks ago.

There have been a number of payments made to creditors in various classes, and a number of reserves set up to cover those which remain disputed or unliquidated or both.

[29] When I began representing the liquidating trustee, we had a number of claims which had been asserted, and which were being litigated in various courts. Some in the Circuit Court. A great many in the Circuit Court, as a matter of fact. Many had been paid. Most had been paid, as a matter of fact. That was the basis for the Eleventh Circuit's finding of substantial consummation.

It became very clearly apparent to me that no provision for the payment of income taxes had been made. We were getting more and more concerned that the Internal Revenue Service would take the position that they had some right, which we dispute, to some or all of these funds which the liquidating trustee has.

I began consistently to take the position in front of you that while orders could be entered determining fees and costs and allowing claims and ordering them to be paid, none should be paid until we had this determination. You can not half determine who the creditors entitled to share in this estate are.

At the suggestion of a great many of the people and at your urging, I think at one time at your direction, I filed this adversary to have this issue finally and completely determined. I know it will be appealed, Judge, I am not innocent about that. [30] Everything else is, this one will be, but we need to get it resolved.

The issues in this case as I understand it from a conference with the Justice Department's attorneys, representing the I.R.S., Mr. DeLeon, and from conferences with our accountants, are as follows.

The I.R.S. I believe takes the position that there are two bases on which the liquidating trust is obligated to file a tax return and pay a tax.

The first is Title 26, Section 6012(B)3 and B4. That is in the Internal Revenue Code. This is the one which says that receivers—well, I will quote it:

> "In a case where a receiver, trustee in a case under Title 11 of the United States Code or assignee by order of Court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such corporation or business is being operated, such receiver, trustee or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns."

Basically, as I understand this section, it [31] simply requires the bankruptcy trustee, non-bankruptcy receiver since there are no more receivers under the Code, and assignees for corporations responsible for the payment of the reporting of income, the filing of a return, and the payment of tax, just as if they were regular ordinary businessmen engaged in the operation of a business.

Parenthetically,the liquidating trustee's position is very simple, and we will have testimony to present to the Court

on this issue. We are certainly not a receiver. No one suggests that we are. We are not a trustee in a case under Title 11 of the United States Code and no one has ever suggested before in any pleading or in any argument to this Court that we are.

We are a liquidating trustee of a liquidating trust established in a plan of reorganization made part of this case by an order of confirmation. We are not an assignee, and there are cases which directly deal with the question of whether a liquidating trustee in a bankruptcy setting has any obligations under this Internal Revenue Code section.

Sub 4 says that returns shall be made by fiduciaries and receivers and 4 says returns of estates and trusts. Clearly we are not an estate. They mean probate estate.

> [32] "Returns of an estate, a trust or an estate of an individual under Chapter 7 or 11 of Title 11 of the United States Code shall be made by the fiduciary thereof."

We are not a bankruptcy trustee. We are not liable to file or to pay the tax.

The debtors have consistently taken that position. There is correspondence, there are statements made to their accountants as well as to the accountants for the liquidating trustee where they have taken that position.

In fact, they went further. They acted on it. They filed tax returns, one or more of the debtors did, in which they picked up the income of the trust because there were two types of income. The first was the proceeds from the sale of the Washington property and the Miami Center property, and the second was the income earned by these monies being in the bank or certificates of deposit or treasury bills. That is the interest income.

The debtors picked up all that interest income and reported it on tax returns that they filed except the last

one. They have now said that they won't file it and they won't be responsible for the tax.

THE COURT: Who has done that among the [33] debtors?

MR. STETTIN: Mr. Gould on behalf of himself, as well as Holywell Corporation has said that on a number of occasions in the last couple of months and written a letter saying that they will not file the most recent tax return.

The basis for the claim of liability by the Government is Title 31, Section 3713, sub A-1, which I really don't think is a basis for the claim but rather the order of priority of payment.

> "The United States Government shall be paid first when, A, a person indebted to the government is insolvent and, B"—
>
> Pardon me, it is sub one.
>
> "The debtor without enough property to pay all debts makes a voluntary assignment of property. 2, property of the Debtor, if absent, is attached or, 3, an act of bankruptcy is committed, or, 4"—

And then it refers to deceased debtors, not applicable here.

Subsection two in that section is very clear. It says this subsection does not apply to a case under Title 11. I read that clearly to mean that it exempts bankruptcy proceedings, and there is a logical [34] reason from our perspective, and that is that the taxation of bankruptcy estates is clearly controlled and covered by Section 6012(B)3 which expressly deals with it, as well as by the Bankruptcy Code itself. It simply is not applicable.

There are a number of cases which have addressed this issue. We believe that they support the position of the trustee.

Our opening statement will be we'll have the attorneys, pardon me, the accountants for the liquidating trust who will testify that the Debtor did not turn over its prepetition nor its post-petition books and records, they retain them and they keep them and they use them, they continue, they are discharged debtors. They have every expectation that they will continue in existence when this plan is completed and these proceedings are dismissed.

They have a full time financial officer, Edgar Shomaker, who continues to work for them. They keep their own books and records.

We set up books on a cash basis. That is, to reflect receipts and disbursements of money for the purposes of the liquidating trust and reports have been filed with the Court prepared by the accountants for the liquidating trust.

[35] In one of those reports, the evidence will show, it's the second one, a reserve was established in an excess of caution at the request of Mr. Wolff to show a potential that there might be some tax due. This was on the interest income.

The debtor filed objections to that report and said clearly, there is no tax due. We pay the tax. The liquidating trust does not. It is not a taxable entity.

THE COURT: Who said that?

MR. STETTIN: Mr. Gould, his lawyers. Fred Kent filed that motion.

THE COURT: All right.

MR. STETTIN: There will also be testimony from the accounts for the debtors, Touche Ross. They have said in writing the liquidating trust is not a taxable entity, the debtors remain the taxable entities involved and responsible for the filing of reports showing all gains and the payment of taxes on those gains.

The liquidating trustee will testify briefly as to the fact that he is the liquidating trustee and his responsibilities

have never included operating a business. All they have ever been is to hold the proceeds of the liquidating trust, to identify the creditors, to determine their priority and to get them paid pursuant to Court order. That's his job.

THE COURT: You draw a distinction between the terminology turned over and operated?

MR. STETTIN: Yes, sir. The reason I do is because a number of the cases have addressed that, including one I think that you may have been involved in that was called In Re. Cusado Distributors.

THE COURT: That involved wine.

MR. STETTIN: Yes, sir. A beer and wine distributor. It was a Section 960 claim. Another Section which Mr. DeLeon has indicated to me they do not rely upon as a basis for claiming the liability of the liquidating trust to pay taxes.

THE COURT: That was a case in which the Court held that the trustee was not liable for the State of Florida taxes.

MR. STETTIN: The excise taxes on beer and wine.

THE COURT: When it was liquidating an estate.

MR. STETTIN: That's exactly right. He was not operating the business. That is part of the reason that I had anticipated putting on testimony to show there was no business operation, we were simply [37] liquidating, holding and then disbursing to creditors.

The key in this, Judge, and I will stress this repeatedly, is that we are not a trust in the sense that we have a continuing independent existence which will go on forever. That is not true.

The residuary beneficiaries in this case are the debtors. They will get every nickel of everything that is left over and because of that, from the beginning Mr. Gould and his firm, his firms, have always been involved in determining

who should be representing the trust, what defenses should be raised, what settlement should be made, what payments should be made because it was his ultimate money that we were talking about. Anything left was his and we still take that position.

We are going to have a shelf life, a radioactive existence that will be determined. We will in fact end our existence when these claims are paid and everything else goes back to him. He remains the debtors, they remain in existence.

I will tell you that there is one interesting distinction in the tax laws, as I understand it, and that is individual debtors do not have their taxes discharged. Corporate debtors may have their taxes discharged.

[38] Now, you've got some of each in this case. Mr. Gould is an individual debtor and you've got a corporate, one or more corporate debtors as well.

We don't have that dispute. Whether or not the Internal Revenue Service has any rights left against Mr. Gould is not our fight.

There will also be some testimony, Judge, I anticipate, concerning transferee liability, and you ought to keep this fact in mind. The I.R.S., it seems to me, will try and argue that the Washington proceeds payable to Twin Development were owed by Twin, the tax liability would be owed by Twin. That is a creditor of Twin, and certainly you have to pay the creditors of the subsidiary before you upstream those monies or dividend them up and then have the parent use it to pay the parent's creditors. It makes sense to me.

The tax liability of Twin for the Washington proceeds is a post-confirmation liability. It didn't arise until the sale had—pardon me, I am wrong on Twin. I take that back.

That is a post-filing liability. It is not a prepetition claim, because the monies didn't come in until after the Chapter 11 proceedings were already in existence.

Our position will be very simple. The [39] Internal Revenue Service knew of the existence of the plan which proposed to use these Washington proceeds to pay creditors of Holywell and the other consolidated debtors and did nothing. They did not object, they did not file objections to the disclosure statement, which failed to state this—the Bank of New York's disclosure statement simply didn't address it. They did not object to the confirmation of the plan and did not appeal it.

We say that they are estopped, and I have got one very good case which walks about estoppel running against the Internal Revenue Service on very similar facts.

The post-confirmation issue that I was addressing before arises from the proceeds from the Miami Center sale. The Miami Center sale occurred on October 10th, which was after confirmation had occurred. Those taxes, if there are any due, are a post-confirmation tax liability.

Our position is very simple. The properties put into the liquidating trust are not to be used for post-confirmation debts, except as expressly provided in the plan, such as administrative expenses, fees and costs. We are not liable for post-confirmation taxes. The debtors may be and they continue in [40] existence. The Bank of New York may be under some theory that the Internal Revenue Service may have, but not us.

Our job is to simply identify and pay creditors from funds which are available to us. Those funds available to us in fact are the Washington proceeds, Miami Center proceeds and the interest which we have earned on those monies, and if necessary, and I have always said this, any other assets which the debtors may have if it becomes necessary to use them.

Thank you, sir.

THE COURT: Government? Who will speak for the Government?

MR. DeLEON: Good afternoon, Your Honor. Frank DeLeon with the Tax Division of the Department of Justice.

THE COURT: Is Miss Koonce involved in this at all?

MS. KOONCE: No, Your Honor, just observing.

MR. DeLEON: Your Honor, after the very complete factual explanation of the trustee, I'll be very brief.

Despite the presence of so many attorneys and so many potential witnesses, I believe that the [41] issues involved in this case are very simple, and that is just who has to file the tax return and who has to pay the taxes.

THE COURT: Did we determine the years, Mr. Stettin, as you promised me?

MR. STETTIN: It would be taxes which would have accrued as a result of a sale of the Washington property partially in 1984 and partially in 1985, and the Miami Center property which was sold in October of 1985.

Keep in mind, Judge, that there are split years because the debtors' tax years are not calendar years. Their tax year is July 31, every year, July 31.

THE COURT: All right.

MR. DeLEON: If I could expand on that. The two years at issue, one of them fiscal year ending July 31st, 1985, which is preconfirmation, the other year is ending July 31st, 1986, which is post-confirmation.

The position of the government in this case is very simple. The trustee, pursuant to the provisions of the plan that was confirmed in this case, is responsible to file a tax return pursuant to the provision of 62(B)3 and 62(B)4.

The evidence that the Government will be [42] presenting to Your Honor will be the plan itself, which will make very clear that a trustee either holds title or has possession of all or substantially all of the assets of the debtors, and is therefore responsible to file those tax returns on behalf of the debtors as contemplated by those provisions that I cited.

Once the trustee is responsible to file the tax returns pursuant to 6012(B)3 and 4, pursuant to Section 6151 of the Internal Revenue Code, he has to pay the taxes.

Also, it is the position of the United States that those taxes are an expense of the administration of the trust and as such have to be paid before the other claims are paid.

MR. STETTIN: I didn't hear the very last thing, have to be paid before?

MR. DeLEON: Pursuant to the plan, as a first priority, whatever priority they are given in the plan.

That is the position of the United States, Your Honor, which is very simple.

THE COURT: Ms. Mitchell, do you have anything to say to that?

MS. MITCHELL: No, Your Honor. Mr. DeLeon is speaking for us.

[43] THE COURT: Counsel?

MR. MUSSLEMAN: Just a couple little corrections of factual matters. The order which Mr. Stettin referred to permitting the use of the Twin proceeds expressly said that it was the net proceeds and that was disregarded in what was thereafter done and the entire proceeds went over.

The original order required that the Twin proceeds be segregated from the Gould and Holywell proceeds, and then in response to the bank's emergency motion the entire amount was transferred after the bank's debt had been paid so that there was no longer any basis for cash collateral. The order was restricted to the net proceeds, nevertheless, the liquidating trustee took all of them.

THE COURT: I imagine that during the course of the trial, I will be furnished with the various orders that you refer to.

MR. MUSSLEMAN: Yes.

THE COURT: All right.

MR. MUSSELMAN: Secondly, to clarify the matter of the filing of the returns, as Mr. Stettin pointed out, Holywell files a consolidated return for itself and its subsidiaries and it files this on the basis of a fiscal year ending July 31st. Accordingly, [44] Holywell filed the last return for the period that ended while it was a Debtor-In-Possession. It did not pay the tax on that return because its assets had since been taken by the liquidating trustee, but it did file a return.

The return for the following year was essentially almost exclusively the transactions of the liquidating trustee and not the transactions of Holywell.

MR. GOULD: I want to clarify a few additional facts.

THE COURT: You want to clarify it further.

MR. GOULD: That's right, since I apparently know more about this than anybody else does.

The funds came from the sale of assets of four partnerships, the Washington proceeds came from the sale of the assets of four partnerships and Twin Development Corporation, along with four additional non-filed subsidiaries of Holywell Corporation.

Only the funds incurring to Holywell and myself were placed—they were placed in three segregated accounts, Holywell, myself, and Twin Development Corporation.

The Bankruptcy Judge, Bankruptcy Judge Britton, did not make a distinction between the funds [45] payable to Holywell and three other subsidiaries because they were only approximately $2,800,000, so Holywell's funds and the funds of four other non-filed subsidiaries were placed in a single account. Those funds were then invested in treasury bills.

On October 10, 1985, the trustee took possession of the funds in my account and Holywell's account. The Miami Center Limited partnership and I file on a calendar basis. Holywell files on a cash basis. It files consolidated returns

mind you, this is consolidated with each individual subsidiary as a separate taxable entity.

Each individual subsidiary has its own balance sheet, as the Internal Revenue Service Code requires, and its own income statement, and then they are merged with Holywell for the purpose of the payment of taxes or alternatively to shelter because of the losses of the parent company.

THE COURT: All right.

MR. GOULD: That's the first point.

The second point is that we concede the Miami Center Liquidating Trust is not a taxable entity, it is not a taxable entity. Mr. Smith is also not a liquidating trustee. He is a trustee appointed by the Court on August 12, 1985, for the Miami Center [46] Liquidating Trust and the trust assets, specific liquidating funds are enumerated in Article IV of the plan, for the payment of the claims of creditors.

Mr. Smith is a fiduciary. The Internal Revenue Service is right, he is a fiduciary in possession of substantially all of the assets of Holywell Corporation and, for that matter, improperly, its non-filed subsidiaries who are not, as you are aware, they're all solvent and not part of this proceedings, and from the very beginning I have objected and no plan, Your Honor, no plan submitted by the debtors has ever offered to use a single penny of Twin's funds for anything but the payment of Holywell's liabilities.

So, any statement of that kind by Mr. Ziegler or Mr. Stettin is misinformed. If it's not misinformed, they know that they are wrong.

Now, I don't think that there is any doubt, you can look at the returns, that Mr. Smith is a fiduciary and he has substantially all of the assets of Holywell Corporation.

Let me tell you, this thing is even more complex than Mr. Stettin has indicated because when they substantively consolidated Holywell Corporation and the Miami Center

Limited Partnership, Chopin Associates, [47] what they did was they substantively consolidated separate taxable entities. Holywell Corporation's books and records were all in Virginia, and most of its income came from Virginia, and the commonwealth of Virginia frowns upon not being paid taxes because somebody down here in Florida has taken all of the assets and refuses to pay the taxes.

Now, what we did, and I want you to know this, too, we had 30 or 40 bookkeepers and accountants when Holywell Corporation and these various partnerships and management companies were in operation. After the plan was confirmed, we were reduced to three bookkeepers, so we filed the July 31st, 1984 return and there were no taxes payable because the losses from the Miami Center Limited Partnership sheltered the income of Holywell Corporation and its consolidated subsidiaries, but there was a deferred tax liability of approximately $2,800,000.

On July 31st we then came along and we only had—we filed July 31st, 1985, and that, the income again was sheltered by Holywell's interest, Holywell owned ten units in the Miami Center Limited Partnership, so it was sheltered to the extent that the tax liability was approximately $264,000, and this is the Federal tax liability, approximately $264,000, but the deferred tax [48] liability, approximately $9,700,000, or $9,800,000.

The tax payable to the State of Virginia, July 31st, again, in 1984, no taxes payable because of the shelter, again they are deferred as of July 31st, 1985, except to the extent of approximately $93,000, and now we come to July 31st, 1986. The trustee has taken possession of approximately $32 million in cash. $16,700,000 of that cash is from the non-filed companies, and the $30 million or so, $32 million, includes $1,600,000 in interest income that has not been reported because Holywell is on a cash basis.

Now, I acknowledge that the return has to be filed on behalf of the debtors or the discharged debtors. In this case the return has to be filed just as the Code says, on behalf of Holywell Corporation, a return has to be filed on behalf of Chopin Associates, Miami Center Limited Partnership, and I have filed a return myself.

We have not, contrary to what Mr. Stettin has said, reported all of the interest income. We only reported, I originally reported the interest income applicable to my assets.

He has $17 million in cash in the trust. That cash is fundamentally the assets of the non-filed companies.

[49] Remember, again, July 31st, 1985, Holywell filed a tax return as they have periodically since Holywell's incorporation, and each individual subsidiary's balance sheet shows specific assets and liabilities.

The interest income that has been earned by the trust is all interest income of those subsidiaries. Those subsidiaries are jointly and severally liable with Holywell Corporation for the payment of their taxes, but Mr. Smith is in possession of all of their assets.

Now, I don't quite understand how somebody can sit there and take $2 million in interest income and say he is not a taxable entity, I agree with that, but then say I am not going to pay the taxes. I don't understand how somebody can take $32 million of profits of a group of companies, take them into his possession, use them, and say he is not going to adhere to the Code.

There is an interesting case called I.J. Knight (phonetic). Another one called Sapphire Steamship Lines (phonetic).

It doesn't refer to the issue of operating trustees. It refers to the issue of non-operating trustees.

I am not saying Mr. Smith operates Holywell Corporation. He doesn't operate Holywell [50] Telecommunications. He is a non-operating trustee and a fiduciary.

Where is the money going to come from for payment of the taxes?

He is sitting there holding it. He is earning interest income on it.

I am a simple businessman and a farmer, and I also have a reasonably good education, okay, I also have a reasonably good education, and I have deferred taxes for a long time sheltering it, and I will tell you that some aspects of the Code as they were passed apply specifically to things that I did to shelter income, but there is a time when the taxes have to be paid and they have to be paid now and I expect them to be paid. The Government does.

Thank you.

MR. CARTER: Good afternoon, Your Honor. Francis Carter for the Bank of New York. With me are Harvey Ziegler and Tom Noone.

I have a feeling that the Court has had about as much clarification as it can stand at the moment, so let me simply say that the Bank of New York understands the trustee's position. If the trustee is liable, he wishes to shift that to us.

With all due respect, we disagree with that [51] position but we think, so that we can get some focus here this afternoon, that we should defer argument on that matter.

We agree with the trustee's position that the trustee is not liable, that the debtors are liable to file returns and to pay the taxes, and we would reserve the right to argue the secondary issues only if it's necessary to argue them.

Also, Your Honor, we have filed a reasonably brief memorandum of law with the Court and we hope the Court will consider that.

THE COURT: First witness.

MR. STETTIN: You've heard it. I will simply disagree with a number of the items that Mr. Gould and Mr.

Musselman have stated, but I think it's appropriate during the trial.

MR. GOULD: Can I read something to the Court before the trial begins?

THE COURT: Surely.

MR. GOULD: It's two things. This is a transcript, part of a transcript from July 18, 1985, Pages 98 and 99. This is the substantive consolidation hearing. This is Judge Britton speaking to the Bank of New York and to our counsel. I in fact was not there.

THE COURT: The last point I want to touch [52] on are the tax consequences. In this area, I readily concede that I am a babe in the woods and haven't the foggiest notion of what the tax consequences would be on the particular decision. If a modification of this plan or any other adjustment can be made to eleviate adverse tax consequences for the debtors, then I think that a request for such a modification ought to be respected and honored, and I would so as long as I have the discretion to do so intend to accomplish that result.

"I think that all of us have recognized in our discussion that there might be tax consequences. We are not certain if we have considered all that we could do to eleviate the adverse tax consequences."

As a tax expert, I will tell you there is only one way that can be done and that is by not selling Miami Center Limited Partnership's assets.

The Bankruptcy Court on January 29, 1986, adopted verbatim the findings of fact proposed by the Bank of New York. Page 40 and 41, it says:

> "There has been no evidence to substantiate the debtors' claims that substantive consolidation will somehow cost them approximately $17 million in Federal income taxes."

Now, when you read the bank's memorandum, I think you ought to read it in the light of, one, of their knowledge

that there were adverse tax consequences. Presumably they are sophisticated businessmen, they know that a sale of assets results in tax liabilities.

Secondly, the findings of fact that they induced Judge Britton to adopt verbatim that there was no evidence of a tax liability.

Thank you.

MR. STETTIN: Would Your Honor care to take a short recess? You have been going since 1:00.

THE COURT: Five minutes, please.

(Whereupon, a short recess was had, after which the following proceedings in the foregoing hearing were had:)

THE COURT: First witness, please.

MR. STETTIN: Don Denkhous.

[54] THEREUPON:

DONALD ANDERSON DENKHAUS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STETTIN:

Q. Please tell us your name and business address?

A. Donald Anderson Denkhaus, D-e-n-k-h-a-u-s, with Arthur Anderson Company, located at One Biscayne Tower, Miami.

Q. What is your occupation?

A. Certified Public Accountant.

Q. How long have you been a CPA in Florida?

A. For 18 years.

Q. Are you certified in any other jurisdiction, sir?

A. No, I am not.

Q. What is your area of specialty in accounting with Arthur Anderson?

A. I am in charge of our accounting and audit practices for South Florida, for the Miami and Fort Lauderdale area.

Q. Are you a partner in the firm?

[55] A. Yes, I am.

Q. Is Arthur Anderson the accounting firm that was retained by the liquidating trustee to handle the accounting functions for the liquidating trust?

A. Yes.

Q. Are you the partner in charge of that particular engagement?

A. Yes, I am.

Q. Tell me what you understand the responsibility of Arthur Anderson is in that engagement?

A. We were assigned as accountants to represent the liquidating trustee in fulfilling his responsibilities, and our initial order didn't specify what the role of accountants would envision, so that role was one that has evolved as time went on, but our primary role was to keep track of the cash receipts that came into the liquidating trust and the disbursement of funds out of the liquidating trust.

Q. To that end, have you set up a set of books for the purpose of reflecting the receipts and disbursements of money in and out of the trust?

A. Yes, we have.

Q. Are those books and records supervised under your control?

A. Yes.

[56] Q. Has the firm of Arthur Anderson assisted the liquidating trustee in filing reports with the Court reflecting the activities of the liquidating trust?

A. Yes, we have.

Q. Was there a report filed with the Court which indicated in any way, that is a report which Arthur Anderson helped prepare, which indicates in any way a reserve

for Federal income tax on the interest income of the monies held by the trust?

A. Yes, there were. I believe there were three reports that we prepared that with the assistance of the liquidating trustee and his counsel at that time, that included reserves, and one of these reserve items includes a reserve for income tax, potential income tax, on the interest earnings of the trust itself.

Q. Let's digress for just a moment.

During the time that Arthur Anderson has been the accountant for the liquidating trust and you have been the partner in charge, have any tax returns been filed by the liquidating trust or the liquidating trustee for his earnings?

A. No returns have been filed.

Q. Have any monies been paid to the I.R.S. for or on behalf of the liquidating trust by the liquidating trust itself?

A. Not directly. Initially, there were some funds that were held, withheld 20 percent withholding on the interest earnings of several of the bank accounts, but there have been no voluntary payments made by the liquidating trustee.

Q. Is that because there was no tax i.d. number and the bank, I think it was Sun Bank, automatically withheld 20 percent of the interest earned?

A. That is correct. They were furnished an i.d. number and discontinued withholding.

Q. I understand. Let me show you this pleading called supplement to debtors' objection to liquidating trustee's second request, apparently signed by Kent, Watts, then the attorneys for the debtors, dated June 9, 1986.

MR. GOULD: Excuse me. We are willing to concede that the trust is not a taxable entity.

The Government is willing to concede that the trust is not a taxable entity; is that correct.

MR. DeLEON: We agree the trust is not a separate taxable entity apart from the corporations, from the Debtor corporations.

MR. STETTIN: Will you agree that the trust is not responsible for the preparation or filing of tax [58] returns for any of the debtors?

MR. DeLEON: No.

MR. STETTIN: Then you had better let me make my case.

MR. GOULD: It is a different issue, but we concede the trust is not a taxable entity.

THE COURT: With that concession, why don't you proceed, then, with your case, for whatever other purpose you care to introduce that. Let's go.

MR. STETTIN: Yes, sir.

BY MR. STETTIN:

Q. Let me show you this document.

Have you ever seen it before, sir?

A. Yes, I have.

Q. If you will turn to well, let's get it into evidence before testifying.

MR. STETTIN: I will offer it into evidence as the trustee's first numbered exhibit.

THE COURT: No objection, Plaintiff Exhibit Number 1.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 1 and received into evidence.)

BY MR. STETTIN:

Q. Sir, if you would, was that exhibit [59] prepared by the debtors' lawyers as an objection to certain accountings filed by the liquidating trustee?

A. Yes, it was an objection to the second report filed with the Court.

Q. On the part where the liquidating trustee reflects he had set up a reserve for $500,000 to pay Federal income tax on the interest income of the liquidating trust, what does the Debtor show the liquidating trust should pay as Federal income tax?

A. Zero.

Q. Thank you.

Let me show you this letter which is dated just a few days before that, June 5, 1986. It's addressed from Mr. Clifford G. Benson, Jr. to Mr. Theodore B. Gould, and ask you if you can identify this as a document that you received in the ordinary course of your business on behalf of the liquidating trust?

THE COURT: Is Mr. Benson with Miss Mitchell's group?

MR. STETTIN: No, sir. He is with Touche Ross. They were accountants for some of the debtors.

THE COURT: I try and include you, Miss Mitchell.

MR. STETTIN: Any objection?

[60] MR. GOULD: No.

MR. DeLEON: No.

MR. STETTIN: Without objection, I will offer it into evidence as the Trustee's next exhibit.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 2 and received into evidence.)

BY MR. STETTIN:

Q. Sir, did you receive a copy of this letter in the ordinary course?

A. Yes, I was not directly copied on it, but I did receive a copy of that letter.

Q. Who was Mr. Benson at that time?

A. Clifford Benson is a tax partner with the accounting firm of Touche Ross.

Q. Who did Touche Ross represent as accountants in this matter?

A. They represent Miami Center Limited Partnership and Holywell Corporation and subsidiaries at that time.

Q. Would you please read the third full paragraph of this letter out loud, sir?

A. "Based upon the above facts, we believe no new taxable entity has been created by the bankruptcy proceeding for M.C.L.P. or Holywell."

[61] "We further believe that the interest earned on the vested funds should be allocated to the taxable entity that contributed those funds. We will insure that this income is included in the tax returns for the entities we prepare."

Q. Thank you, sir.

Let me show you next this letter dated March 11, 1987, on the stationery of Holywell Corporation, which appear to have be sent by Mr. Gould to Irving Wolff, the then attorney for the liquidating trustee, together with a memo that's identified in it the day before, from Mr. Shomaker to Mr. Gould.

MR. DeLEON: No objection.

MR. GOULD: Fine.

MR. STETTIN: Neither party has any objection. We will tender it in evidence as the Plaintiff's next number, which will be three.

THE COURT: Composite?

MR. STETTIN: Yes, sir.

THE COURT: So admitted.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 3 and received into evidence.)

BY MR. STETTIN:

Q. Sir, did you receive a copy of this letter [62] and the memorandum in the ordinary course of your business on behalf of the liquidating trust?

A. Yes, I did.

Q. I ask you to read out loud the text of the letter of March 11. It's rather short.

A. "Since the Miami Center Liquidating Trust is not a taxable entity, the interest earned on the funds deposited by the liquidating trustee in the certificates of deposits, treasury bills and repurchase agreement has been reported as taxable income in 1985, and in accordance with Edgar Shomaker's attached memorandum, the taxable interest income has been segregated to the account of Twin Development Corporation, Holywell Corporation, Miami Center Limited Partnership and myself. The interest income for 1986 will also be reported separately by each of the above taxable entities."

Q. Sir, to your knowledge, were there any tax returns which were filed by it or on behalf of the M.C.L.P. or Holywell which did indicate as income the interest which had been earned on the monies held by the liquidating trust?

A. We have received copies of the Miami Center Limited Partnership tax return for 1984 and 1985. It is [63] my understanding it includes the interest income but from looking at the tax returns, there is not sufficient information to determine that in the actual tax return.

MR. STETTIN: I have got one further letter agreement which I don't believe the parties have any objection to the admission.

MR. DeLEON: No objection.

MR. GOULD: No.

MR. STETTIN: It's a letter dated March 19, 1987, from Edgar Shomaker, chief financial officer of Holywell

Corporation to Fred Smith, concerning interest withheld in 1985.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 4 and received into evidence.)

BY MR. STETTIN:

Q. Would you please read out loud the third paragraph, the second and third paragraph?

A. "Since the Miami Center liquidating trust is not a taxable entity, all interest earned is allocable to the appropriate debtors and no interest should have been withheld by the bank. The appropriate forms should have been filed to get a refund of the $8,414.98."

"If in fact the trust had a responsibility [64] to file a fiduciary return, which we believe it does not, those returns are done on a calendar year basis. You therefore would have to file at the end of 1985, at the end of 1986. You did not and have not been advised to do so. However, the debtors, as the appropriate taxable entities, have filed tax returns including the 1985 interest income earned.

"It follows, then, that your advisor's internal opinion is that the trust is not a separate taxable entity.

Q. So, the $8,000 or so that he is talking about, is that the money that was withheld by Sun Bank the first time that interest was due to the liquidating trustee?

A. Yes, for failure to file a tax i.d. number.

Q. Was a tax i.d. number filed as a result of that request so that there would be no withholding from that point forward?

A. Yes, it was filed.

Q. In connection with your work as the partner in charge of this account, have you ever seen any evidence in the form of cash flow in or out or reports on operations,

that the liquidating trustee operated in any manner the business activites of the debtors?

[65] No, I have not.

Q. In fact, is it a fair statement, sir, that the only activities of the liquidating trust have been to hold the assets which were designated in the plan for payment of creditors and to identify and determine the amounts and priority of creditors?

A. Yes. The only financial information that we had access to was the cash receipts and expenditures of the funds that were under the control of the liquidating trustee.

MR. STETTIN: Nothing further on direct.

THE COURT: Cross, please.

MR. GOULD: Can I go first?

MR. DeLEON: Go ahead.

CROSS EXAMINATION

BY MR. GOULD:

Q. As Trustee's accountants, have you segregated the assets in your accounting of the various debtors estates including the assets of the non-filed companies, Twin Development Corporation and the other subsidiaries?

A. No, we have not.

Q. Has Touche Ross filed Holywell returns? To your knowledge, has Touche Ross filed Holywell tax [66] returns?

A. They may have at some point in time. They have not filed the recent tax returns.

Q. Touche Ross was not Holywell's tax accountants.

MR. STETTIN: I object and move to strike, if that is a statement, Judge. This is cross examination. He can ask him if he knows.

THE COURT: Please do it.

MR. GOULD: May I see the last exhibit?

BY MR. GOULD:

Q. In the third paragraph of this exhibit, it refers to the trust has a responsibility to file a fiduciary return.

In your opinion, in view of the Internal Revenue Code, which defines a fiduciary as being responsible, as being somebody who has a confidential relationship with the assets, do you believe that that was simply an error?

THE COURT: First of all, let me do this.

Do you agree that the Code, paraphrased, alleges this?

THE WITNESS: Let me remind the Court, my primary responsibility is accounting and audit practices of Arthur Anderson. I am not a tax practitioner and I [67] am not familiar with the exact language contained in the Internal Revenue Code. I use the expertise of my tax department.

MR. GOULD: Then let me introduce an exhibit. We will have you introduce it. Perhaps we could put –

BY MR. GOULD:

Q. Are you familiar with that memorandum?

MR. STETTIN: Before you answer, let me take a look at it.

MR. GOULD: I will give you a copy of it.

THE WITNESS: Yes, I have received a copy of it before.

BY MR. GOULD:

Q. It is a memorandum that was prepared at Mr. Smith's request and with your knowledge concerning the issue of whether or not the Miami Center Liquidating Trust was a taxable entity and was prepared by Holland & Knight.

MR. STETTIN: Objection, the document itself is the best evidence of what its contents are, Judge.

THE COURT: Do you know the answer, sir?

THE WITNESS: Yes.

THE COURT: Answer the question, please.

[68] THE WITNESS: There was concern whether the trust was a taxable entity and that was an internal memorandum prepared by the Holland & Knight tax department on behalf of Irving Wolff and the liquidating trustee regarding tax research into this matter.

BY MR. GOULD:

Q. Does this memorandum define the ordinary duties of a trustee and a fiduciary?

MR. STETTIN: Your Honor, he is asking him the contents of the document. It's not in evidence.

MR. GOULD: I just introduced it.

MR. STETTIN: The rule is still that the Judge makes the ruling on what is in evidence and what is not.

If it's offered, Judge, I object to its admission into evidence.

THE COURT: On what basis?

MR. STETTIN: First of all, it's an internal memorandum between the liquidating trustee and his lawyers and are privileged.

Second of all, this witness has said that he has no tax expertise. He is not the custodian of it. He has got to lay a proper predicate to get it admitted into evidence. This witness has just said that he has seen it. That does not make it admissible into [69] evidence.

THE COURT: Let's visit your objection.

MR. STETTIN: Yes, sir.

THE COURT: It's privileged, why?

MR. STETTIN: Because it was written by Irving Wolff and his firm to his client, Fred Stanton Smith, the liquidating trustee. At that time Irving was the lawyer for Fred.

THE COURT: I understand that.

MR. STETTIN: Second, there has been no proper predicate laid for its admission.

THE COURT: Sustain the objection and rephrase your question, and I will be back in five minutes. I have a matter that I have to take care of.

(Whereupon, a short recess was taken, after which the following proceedings in the foregoing hearing were had:)

THE COURT: Let's proceed.

So, the rephrased question is as follows.

MR. GOULD: Before I rephrase the question, Your Honor, I want to point out to you that the Bank of New York has taken the position that it was not possible to assert accountant-client privilege, attorney-client privilege in this case, in the bankruptcy proceeding, and in fact I believe, as I recall, has cited some case [70] that you previously decided.

MR. STETTIN: But this is an attorney-client privilege.

THE COURT: The other one was an accountant. That is why I asked Mr. Stettin to repeat his objection because I, too, thought that Mr. Stettin had lost his head, but he was asserting the attorney-client privilege.

MR. GOULD: In this particular instance, the document is already in public hands, it's in my hands, in the hands of other people. I don't think that you can assert attorney-client privilege when the document is floating around in the hands of many people.

THE COURT: Why don't you go ahead and ask the question, please.

BY MR. GOULD:

Q. Are you aware of the issue that was defined in this memorandum which defined—which is defined, the trustee is a fiduciary—

MR. STETTIN: Judge, he is reading from a document not in evidence.

MR. GOULD: May I introduce this into evidence?

THE COURT: What is the nature of that? Let's see what it is.

[71] MR. STETTIN: It's a memorandum written by Mr. Wolff, it's a lawyer from Holland & Knight, Richard Wheeler (phonetic), who is writing to his supervising partner at the time, Irving Wolff, concerning the classification of the bankruptcy liquidating liability for Federal income tax.

Something, by the way, Mr. Gould has already acknowledge isn't obligated to file the returns.

Having said that, it is attorney-client privileged. I don't know how he got it and it has not had any predicate laid at all for submission into evidence by this witness.

THE COURT: I would be interested in it, and so for whatever evidentiary value it has, I'll admit it.

(WHEREUPON, the document referred to was marked as DEBTOR'S EXHIBIT A and received into evidence.)

THE COURT: Let's proceed, please.

MR. STETTIN: In order to make sure that our record is complete, I believe the document is hearsay as well. Therefore, I object to its admission on that ground.

THE COURT: I will admit it under the hearsay exception.

[72] MR. CARTER: Which one?

THE COURT: Not for the truth of the matter asserted but the fact that it was stated.

Let's proceed.

BY MR. GOULD:

Q. Is the memorandum an analysis of the issue of whether or not the trustee is a fiduciary under the Internal Revenue Code and Section 7711 of the Internal Revenue Code?

MR. STETTIN: He is referring to Page 3.

THE WITNESS: Yes, that is one of the issues, the issue.

MR. STETTIN: Would Your Honor care to follow along with them and look at the conclusion of the memorandum writer immediately underneath, statement of the issue?

THE COURT: It's in evidence. I can look it over. Let's proceed.

BY MR. GOULD:

Q. Does Page 4 define the term fiduciary under the Code?

A. I can only read what Page 4 has.

Q. It's in evidence. Thank you.

Having read this previously, would you agree that Holland & Knight's conclusion is based upon [73] the assumption on Page 10, at the top of Page 10, that the Trustee's duties are ministerial in nature?

A. My original reading of this document was probably a year and-a-half ago, but reading that particular section that you refer to, that appears to be one of the assumptions that makes up the opinion.

MR. GOULD: I don't have any more questions about this. Thank you very much.

THE COURT: Thank you.

MR. MUSSELMAN: Your Honor?

THE COURT: Let's see if we can get ourselves organized.

MR. MUSSELMAN: I just want to ask one question.

THE COURT: All right, but see if you can't adopt and get together as to the questions so we don't just keep popping up here. I recognize you have the right, but in order to move the case along, see if you can't as a table get yourselves organized.

MR. DeLEON: Your Honor, I don't represent the debtors.

THE COURT: I said see if you can. I didn't commit you, although I might if you don't behave.

(Laughter)

[74] **CROSS EXAMINATION**

BY MR. MUSSELMAN:

Q. Sir, you said previously that you did not, in the accounting work that you did, segregate the accounts of the different entities.

Can you tell us why that was your policy?

A. Yes. We were instructed by Irving Wolff and his personnel to not segregate the accounts.

When the original monies were received into the trust, there was a transfer of ownership of the individual bank accounts that came in, and those accounts were later consolidated and investments were consolidated and, as recommended by counsel, Mr. Wolff, the liquidating trustees, he believed that the liquidating trust was given a consolidated amount of money and it was not the responsibility of the liquidating trustee to separately try to account for the source or payment of those funds.

Q. So that neither the source nor the particular claims that were paid were identified?

A. That is correct. They were – within the court orders of settling the claims, there may have been one defined debtor that was responsible for that payment, but the accounting records that were set up did not segregate and track them by debtor entity.

[75] Q. You are testifying that this was because there was a transfer of ownership of the cash? I think that is what you said, isn't it?

MR. STETTIN: Objection, Your Honor. That is not a proper characterization of his testimony.

THE COURT: Answer the question, please.

Can you answer the question?

THE WITNESS: Yes. The reason I did it is because we were instructed by trustee's counsel not to segregate the funds and he felt that it may be imprudent to spend the liquidating trust money to pay for professional fees to segregate those funds.

MR. MUSSELMAN: Thank you.

THE COURT: Does the Government have any questions?

MR. DeLEON: No. No questions, Your Honor.

MR. STETTIN: No redirect.

THE COURT: Thank you, sir.

(Witness Excused.)

THE COURT: Next witness, please.

MR. STETTIN: Mr. Benson.

[76] THEREUPON:

CLIFFORD BENSON

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STETTIN:

Q. Sir, would you please tell us your name and your professional address?

A. My name is Clifford Benson. My professional address is Touche Ross, 100 Chopin Plaza here in Miami.

Q. What is your occupation?

A. I am a CPA.

Q. What firm do you practice with?

A. Touche Ross.

Q. Are you a partner in the firm?

A. I am.

Q. How long have you been certified in Florida?

A. About six years, since early 1982.

Q. Are you certified in any other jurisdictions, sir?

A. New York.

Q. How long have you been a C.P.A.?

[77] A. I am trying to remember when I passed the exam. I think it was about 1980, right before I came down here.

Q. Do you have a specialty within the practice of accountancy?

A. Tax.

Q. What is your position in the Touche Ross office in Miami?

A. I am head of the department.

Q. The Tax Department?

A. Yes.

Q. Did Touche Ross represent any of the debtors in the consolidated proceedings that we are involved in now? That is, Holywell Corporation, et al?

A. We were accountants for some of the members of that group prior to the bankruptcy.

Q. In the bankruptcy did you continue that representation of any of the members of the group?

A. We did some work after the bankruptcy based upon a court order.

Q. After confirmation, did Touche Ross continue to represent any of the debtors in these proceedings?

A. No. We continued to do work based upon what we believed was a court order asking us to do so.

[78] Q. Let me show you this document which has been marked in evidence as Plaintiff 2. It's a letter dated June 5, 1986, which appears to have been written by you.

A. Yes. Other than the fact that I apparently didn't sign it.

Q. Not this copy, anyway.

Do you recall the letter?

A. I just looked at it recently, so I can say, yes, I can recall it.

Q. Could you read out loud the first paragraph on the first page?

A. "Based upon the above facts, we believe that no new taxable entity has been created by the bankruptcy proceedings for M.C.L.P. or Holywell.

"We further believe that the interest earned on the invested funds should be allocated to the taxable entity that contributed these funds. We will insure that this income is included in the tax returns for the entities we prepare."

Q. Let me show you next this letter of April 29, 1987, which you did sign.

I would ask you if you can identify it.

[79] MR. STETTIN: Any objection?

MR. DeLEON: No.

THE COURT: Ted, you have seen this?

MR. GOULD: No objection.

MR. STETTIN: We will offer this into evidence as the Plaintiff's next numbered, Plaintiff's Number 5.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 5 and received into evidence.)

BY MR. STETTIN:

Q. I ask you, sir, do you recall this letter?

A. I do.

Q. Does that letter say, basically, the interest allocations are going to be included in the Holywell and the M.C.L.P. tax returns which are going to be filed by the Touche Ross firm?

A. Well, let me see.

Q. That letter is dated April 29, 1987.

A. Well, yes. If we had prepared those returns, the intention was that if there was interest that was supposed to be allocated down there, we would have done that.

Q. Is it your testimony now that given the opportunity to prepare these returns, Touche Ross [80] intends to in-

clude in each one of these debtor's tax returns its allocable share of the interest income earned while the monies were in the hands of the liquidating trust?

A. That's what number five says, yes.

Q. Turn the page and read out loud the second page.

A. "As we said in our June 5, 1986 letter to Mr. Gould, we do not believe that the Miami Center Liquidating Trust as created by the bankruptcy proceeding is a taxable entity."

Q. Why did you say that?

A. We said that because we didn't think it was a taxable entity.

Q. What made you believe it?

A. Well, there are a number of things. Unfortunately, I didn't look at the whole research file before I got here, but I believe there is a Code Section 1399 that stands for the principal that when you form a trust in bankruptcy, that it is just for purpose of liquidation, was just to move money around, not to replace the entities which were still for tax purposes in place.

Q. Did you understand in this proceeding, this liquidating trust was not to take over to the exclusion [81] of the debtors' right forever all of the assets of the debtors?

A. (No response.)

Q. I will restate it, if you would like.

Q. Were the debtors to have any continuing interest in their assets?

A. That would, I guess, require me to go back and read the order and everything else. I don't remember that from the order.

Q. Were the debtors discharged in this case?

MR. DeLEON: I object.

MR. STETTIN: If he doesn't know, he doesn't know.

BY MR. STETTIN:

Q. Is your view that the liquidating trust was not a taxable entity based upon the fact that its purposes were limited by the plan of reorganization?

A. That was our view.

Q. That its purpose was only to identify and pay creditors and turn over the remaining assets to the debtors?

A. Well, I can't define what they were to do but our view was that the taxable entities which were there before the bankruptcy proceedings remained in the bankruptcy proceedings, that for tax purposes, [82] corporations, partnerships, whatever they were, did not lose their tax identity and the trust was simply there to administer whatever went on in the proceedings.

The order was a little difficult to understand from time to time.

MR. STETTIN: Nothing further on direct, Judge.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. GOULD:

Q. Is Touche Ross Holywell's tax accountants?

A. No.

Q. Did it ever prepare a tax return for Holywell Corporation?

A. Not to my knowledge.

Q. As I understand your testimony, the funds that remain that were the assets of Holywell Corporation and Miami Center Limited Partnership, Chopin Associates, non-filed companies, all passed through in effect the chapter proceedings and were taxable to the separate entities; is that correct?

A. I don't know if I said that. What I said was that our understanding of the way to file the returns was that the entities remained as the entities.

[83] Q. As separate taxable entities?

A. Yes.

Q. Right?

A. Right.

Q. Now, would you read into the transcript the Internal Revenue Code. Is that the—what is it, 6012(B)3?

A. Right.

MR. STETTIN: Your Honor, it's not in evidence yet but if Mr. Gould will tell me that it's simply a copy of Section 6012(B)3.

MR. GOULD: I tell you that.

MR. STETTIN: I have a copy of the Code section.

MR. GOULD: Why don't we use the Code Section. You can introduce it into evidence.

THE WITNESS: Would you like me to read this, sir?

BY MR. GOULD:

Q. Yes.

A. All good accountants check to make sure that is really the cite they are reading. Okay.

"Receivers, trustees and assignees for corporations."

This is 6012(B)3.

[84] "In a case where a receiver, trustee in a case under Title 11, United States Code or assignee by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all of the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations required to make such returns."

Q. To your knowledge, does the trustee possess substantially all of the property of Holywell Corporation and its non-filed subsidiaries?

A. That's—I don't know how to answer that, Ted, to be honest with you. I mean—

Q. You did the financial audit for Holywell as of December 31st, 1983?

A. I am assuming we did. I am not the audit partner. To be honest with you, I am not sure what we did.

MR. GOULD: All right. Thank you very much.

THE COURT: How about the pamphlet? Are [85] you going to introduce that?

MR. GOULD: Why don't you put that into evidence?

MR. STETTIN: Your Honor, I will put it in as our exhibit. It's simply a copy of the Internal Revenue Code.

THE COURT: All right.

MR. STETTIN: That would be Plaintiff's Number 6.

(WHEREUPON, the document referrered to was marked as PLAINTIFF'S EXHIBIT NUMBER 6 and received into evidence.)

THE COURT: Any other questions, gentlemen?

MR. DeLEON: No questions.

THE COURT: All right. Thank you, sir.

MR. STETTIN: Thank you.

(Witness Excused.)

THE COURT: Next witness, please.

MR. STETTIN: Fred Stanton Smith.

THEREUPON:

FRED STANTON SMITH

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STETTIN:

Q. Tell us your name and business address, please?

A. Fred Stanton Smith, Keyes Company, 100 North Biscayne Boulevard.

Q. Are you the trustee of the Miami Center Liquidating Trust?

A. I am.

Q. When were you appointed to take over?

A. In the early fall of 1985.

Q. When did you actually take over?

A. October 10, 1985.

Q. Is that the day when the plan became effective?

A. Yes, it is.

Q. Was that the day when the sale of the Miami Center property occurred?

A. Yes, it is.

Q. Other than executing the instruments of [87] transfer, the closing documents on October 10 or October 11, 1985, I know it went into the early morning hours, do you have any other control of any other property other than money of any of the consolidated debtors?

A. No, I do not.

Q. During the time that you have been the liquidating trustee, have you operated any of the business or business entities—

A. No, I have not.

Q. —of any of the consolidated debtors?

A. No.

Q. Have you done anything except hold title to the money and determined the validity, priority and amount of the claims against the consolidated debtors?

A. That's all I have done.

MR. STETTIN: Nothing further on direct.
THE COURT: Gentlemen?

CROSS EXAMINATION

BY MR. GOULD:

Q. I want to clear something up.
On August 12, 1985, were you appointed as the trustee or the liquidating trustee of the debtors estate, Miami Center Liquidating Trust?
MR. STETTIN: I will stipulate, Judge, [88] whatever the order says, and I know there is an order for appointment.
MR. GOULD: There is a reason for that. The term liquidating trust is a term of art. That is, liquidating trustee is.
THE WITNESS: I can't really answer the question.
THE COURT: Do you have the order?
MR. STETTIN: No, but I will get you one.
MR. GOULD: August 12, 1985.
MR. STETTIN: It's a two or three or four page order.
THE COURT: Can you tell the Court and stipulate what the order said, trustee or liquidating trustee?
MR. STETTIN: I can't remember.
MR. GOULD: Trustee.
THE COURT: All right.
MR. STETTIN: Give us a second and we'll find it.
THE COURT: Surely.
MR. ZIEGLER: I have a copy the order. It's part of a large volume that is bound.
THE COURT: Just show it to me and I will take judicial notice of it for the record.
[89] Mr. Gould, do you care to point it out?
MR. GOULD: Right up on top.
THE COURT: Appointed as trustee for the purpose of the bank's plan.

Let's see, the trustee and his representative shall very—how about under duties and responsibilities. Anything in that?

The Court would take judicial notice of the order appointing Mr. Smith trustee by Judge Britton as of August the 12th, 1985.

MR. STETTIN: We will make sure a separate copy is included, Judge. If you will reserve an exhibit number, we will put that in as Plaintiff's Exhibit Number 7.

THE COURT: Good enough.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 7 and received into evidence.)

BY MR. GOULD:

Q. Were you appointed as a trustee in bankruptcy under the Bankruptcy Code?

A. No, I was not.

Q. Upon your appointment as trustee of the Miami Center Liquidating Trust, did you review the Bank of New York's disclosure statement and amended [90] consolidated plan of reorganization?

A. The amended plan, not the disclosure statement.

Q. Are the powers and authority of the trustee specifically enumerated in Article V of the plan of reorganization?

A. They are in the plan. I don't know if it's Article V or not.

THE COURT: Off the record, while Mr. Gould and Mr. Stettin are discussing this.

(Off the Record.)

BY MR. GOULD:

Q. Does Article IV, Means For Execution Of A Plan, specifically enumerate the assets available for the payment

of claims and creditors and liabilities of the debtors' estates?

MR. STETTIN: I will stipulate, Judge, that will be Plaintiff's 8 and we will make sure a copy of that is filed as an exhibit in the case so you will have the opportunity to see it.

THE COURT: What was that document you are going to reserve?

MR. STETTIN: The amended consolidated plan of reorganization proposed by the Bank of New York.

THE COURT: Fine.

[91] (WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 8 and received into evidence.)

BY MR. GOULD:

Q. Did you review and approve the adversary proceeding filed by your counsel in this particular case?

A. I think there are two questions there.

Q. No, no, no, no. You have already answered Article IV. Let's go into the next one.

MR. STETTIN: He is talking about this adversary today.

BY MR. GOULD:

Q. This adversary, did you review it?

A. Yes.

Q. In the adversary proceeding, your counsel has alleged that the Bank of New York did not disclose that there was no provision made for the payment of the debtors' Federal and state income tax liability; is that correct?

A. That's correct.

Q. As the trustee, do you consider the Bank of New York's conduct to be a material act of omission?

A. Yes.

Q. Has it damaged the trust in the conduct of its [92] responsibility to pay claims?

A. I can't judge that.

MR. CARTER: Your Honor, I think he is asking the witness for a legal conclusion.

BY MR. GOULD:

Q. Does the Bank of New York –

MR. CARTER: Your Honor?

MR. GOULD: No, that's all right.

THE COURT: Overruled.

Mr. Gould, I will take care of the proceedings.

MR. GOULD: Sorry.

THE COURT: Proceed.

BY MR. GOULD:

Q. Does the Bank of New York's confirmed plan state that it is a fiduciary acting on behalf of the debtors?

You will find that in Article V, Paragraph 3, sub paragraph W. I will finish the question.

That you did not have a fiduciary duty to determine the debtors' tax liability? Does anything in the Bank of New York's plan state that you do not have the fiduciary duty to determine the amount of the debtors' tax liability?

A. It's a double negative.

[93] Q. No, it's not a double negative.

THE COURT: All right, gentlemen.

THE COURT: Do you know?

THE WITNESS: I don't understand the question with the double negative in it.

THE COURT: Rephrase the question.

BY MR. GOULD:

Q. Does the Bank of New York plan provide that you do not have a fiduciary duty to determine the amount of the debtors' tax liability, federal and state tax liability?

A. No.

Q. Does anything in the Bank of New York's plan state that you do not have the responsibility to prepare the debtors' tax returns?

A. No.

Q. Does anything in the bank's plan state that you do not have the responsibility to establish reserves for the payment of the debtors' federal and state income tax liabilities?

A. No.

Q. Has the trust received interest income since October 10, 1985?

A. Yes.

Q. On behalf [94] of the debtors? Was it on behalf of the debtors?

A. It was interest income for the liquidating trust.

Q. Do you have any idea how much it was?

A. I would venture approximately $2 million.

MR. STETTIN: Monthly statements are generated, Judge, and copies are provided to the debtors. If he has a copy, I will agree to it.

BY MR. GOULD:

Q. Is that post-confirmation income?

A. Yes.

Q. Have any dividends been made to the debtors, the discharged debtors' estate?

A. No.

Q. Has the trust determined—well, I think that's it. Thank you very much.

THE COURT: Any other questions from that table?

How about the Government?

MR. DeLEON: Yes.
THE COURT: Fine. Proceed.

CROSS EXAMINATION

BY MR. DeLEON:

Q. Have you paid any post-confirmation [95] expenses incurred by the estate, by the liquidating trust?
A. Expenses?
Q. Yes.
A. Yes.
Q. Do you have any indication as to how much you have paid?
MR. STETTIN: Again, Your Honor, those are generated on a monthly basis.
THE WITNESS: It's in the reports.
MR. STETTIN: And we will make a copy available to the Government.
MR. DeLEON: I have never received copies, Your Honor.
Are they in the bankruptcy files?
MR. STETTIN: These are generated by Arthur Anderson and made available to the debtors as well as counsel for the liquidating trust.
THE COURT: Counsel for the Government, do not talk among yourselves.
MR DeLEON: I am sorry, Your Honor.
MR. STETTIN: Sorry, sir.
MR. DeLEON: What I would like to do is if the trustee would make those available to me, I would like to introduce them into evidence.
[96] THE COURT: We have got too many moths flying around out there without any string attached to them.
Do you know the answer to the question he asked?
THE WITNESS: Not off the top of my head. It's in every monthly report.

THE COURT: They are available in the Trustee In Possession Reports or whatever classification he is known as, Liquidating Trustee's Report.

BY MR. DeLEON:

Q. But you do have paid post-confirmation expenses from the assets of the liquidating trust?

A. Yes.

MR. DeLEON: No further questions.

REDIRECT EXAMINATION

BY MR. STETTIN:

Q. Let me show you this document dated October 10, 1985, on the stationery of the Bank of New York, and ask you if you received this as part of the closing documentation at the sale of the Miami Center property?

A. Yes, I did.

Q. Is that the indemnification agreement that [97] we have referred to in the adversary complaint?

A. Yes, it is.

MR. STETTIN: I offer it into evidence as the trustee's next numbered exhibit.

MR. ZIEGLER: No objection.

MR. STETTIN: Without objection, Judge.

THE COURT: Any objection from this side of the room?

MR. MUSSELMAN: No objection.

MR. GOULD: No.

MR. STETTIN: I didn't think so.

THE COURT: All right.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 9 and received into evidence.)

BY MR. STETTIN:

Q. Did you rely on this indemnification—

A. Yes, I did.

Q. —in going through with the sale, sir?

A. Yes.

MR. STETTIN: Thank you, sir. I have nothing further on redirect.

THE COURT: Any other questions?

Next witness, please.

(Witness Excused.)

[98] MR. STETTIN: The trustee has no further witnesses, Judge.

THE COURT: All right. How about—I will just go from this side over here.

Does the bank have any witnesses?

MR. CARTER: No, Your Honor.

THE COURT: All right. Mr. Gould, do you have any witnesses?

MR. GOULD: No.

THE COURT: Counsel?

MR. MUSSELMAN: No, Your Honor.

THE COURT: How about the Government?

MR. DeLEON: Your Honor, we don't have any witnesses. I just want to make one clarification. I wanted to introduce into evidence as Government's case the proposed plan of reorganization, but that was already introduced as Exhibit 8.

THE COURT: And that's going to be submitted with a tag on it later on.

MR. STETTIN: Your Honor, if it will save time, if he has another copy—

THE COURT: Do you have one that is not marked up?

MR. DeLEON: It's not marked. I can take the paper clips off.

[99] THE COURT: What are you doing now?

MR. STETTIN: I removed the tag 8 from that one and put it on this one. It's still Plaintiff's Exhibit 8.

THE COURT: It's not marked up? Even if it is, I can fetter it out.

MR. STETTIN: It's clear.

MR. DeLEON: We don't have any more.

THE COURT: Okay. We now have an Exhibit Number 8.

Do you have any other evidence, counsel, or witnesses?

MR. DeLEON: No witnesses.

THE COURT: Any paper evidence or anything?

MR. DeLEON: No, sir.

THE COURT: All right. All sides rest?

All sides rest.

MR. GOULD: Is there closing argument?

MR. STETTIN: He is just asking if you have evidence.

MR. GOULD: We rest.

THE COURT: Now, then, the Court notes that there has been no response in the negative to the question, have all parties rested. With no response, the Court concludes –

[100] MR. STETTIN: We rest, Judge.

THE COURT: Everybody rests?

MR. DeLEON: Yes.

MR. MUSSELMAN: We rest.

THE COURT: A nod of the head.

Mr. Gould, what is your response?

MR. GOULD: Yes, we rest.

THE COURT: All right. Good enough.

The bank had previously indicated they rested. All right.

So there will be no misunderstanding, the Court determines that all sides have rested, all the evidence is in, and now let's have about, with the number of parties in-

volved, and the clock indicating the little hand at four and the big hand at 12, let's now have about ten minutes of your best shots and we will conclude this matter.

MR. STETTIN: Yes, sir.

THE COURT: Incidently, in order to perhaps temper your closing arguments, I am going to ask that each party give me a memorandum of law within ten days so that might have some effect on your closing arguments.

The Bank of New York has already submitted theirs.

[101] MR. ZIEGLER: May we submit another one based upon what has happened at the hearing, to the extent that it may be necessary to supplement?

THE COURT: All right.

MR. ZIEGLER: One was pretrial.

THE COURT: I do not want a responsive memo. It will be simultaneous.

If you feel that you have to supplement your already submitted one, fine.

MR. ZIEGLER: Thank you.

THE COURT: Mr. Stettin?

MR. STETTIN: Yes, sir.

Your Honor, as I understand the case at this point, it's simpler than originally anticipated.

THE COURT: That is what the Government said.

MR. STETTIN: In that the Government does not dispute the fact that there is no obligation on the part of the liquidating trust to file returns.

Have I correctly stated that?

MR. DeLEON: Excuse me?

MR. STETTIN: I think I understood the Federal Government to say there is no obligation on the part of the liquidating trust to file returns.

MR. DeLEON: Our position is that the trust [102] is not a separate taxable entity aside from the corporate debtors.

MR. STETTIN: Does it have an obligation to file a tax return?

MR. DeLEON: It has an obligation to file a tax return on behalf of the debtor.

MR. STETTIN: I am glad I didn't take their offer before, Judge.

As I understand the Government's position, if there is any obligation to file a tax return, it arises under the provisions of Title 26, United States Code, Section 6012(B)3 and (B)4.

The evidence is absolutely unrebutted. There isn't a single piece of evidence that says otherwise than that this liquidating trust was set up pursuant to the terms of a plan, which provided that the 541(a) defined assets of the debtors would be included as the trust estate, including but not limited to, and that I believe is a direct quote, the Washington proceeds and the proceeds from the sale of the Miami Center when it was sold.

From that point forward, the trustee has indicated that the only time he did anything in this case, other than hold money and pay out on claims that were approved, was when he executed the documents of [103] conveyance at the closing, on October 10, 1985. He never operated the debtors' business.

I don't think it can logically be said under any set of circumstances that he was an operating trustee under any facts at all in this case. He did not operate the business of the debtor. The debtor continued in existence. It has its own financial officers, it has its own offices. It certainly has a vigorous proponent of its position, Mr. Gould.

It also has the right to receive every single dollar that is left after the purpose of the trust have been fulfilled, which is the identification, the amount and the payment of creditors.

THE COURT: Which is really our goal, isn't it?

MR. STETTIN: Yes, sir. Yes, sir. Sometimes in the distance but, yes. That tunnel doesn't look any shorter at this point.

Section 6012(B)3 specifically says it is limited in its application to receivers, trustees in a case under Title 11 or assignees. We are none of those. We are not a receiver, we are not a Title 11 trustee in bankruptcy.

The order appointing the trustee specifically says it is an order appointing a trustee [104] under the terms of the bank's plan. It says it in the order. The plan doesn't create a Chapter 11 trustee, it creates a contract trustee, something every one of the parties in this case have consistently said.

He does not have all of the power and au hority of a bankruptcy trustee or that he did for other purposes because in fact it would make the trustee's life much easier. The arguments that the debtor has that there is no continuing jurisdiction of this Court are directly related to the fact he is not a bankruptcy trustee, he is a contract trustee and his contract time ran out, they said.

Now, if that is true, they can't have it on both sides.

The third and last of the areas which the statute refers to is if he is an assignee. Well, he is not an assignee, he is a court appointed person, he is a person who is named in a plan.

There is a case, as a matter of fact, which directly addresses that issue. It's called, just for the record, In Re Sonner, S-o-n-n-e-r, at 53 B.R. 859.

They are talking about a liquidating trust in a bankruptcy proceeding. They are talking about a claim that liquidating trust had the obligation to file the tax returns [105] for the debtors and to pay the tax for the debtors. The Bankruptcy Judge held otherwise.

There was also a claim made that this might even be a trust within the meaning of Section 6012. They were discussing the obligations of the trust in this case.

The provisions of the plan, I am reading from Page 864:

> "The provisions the plan control and both Sonner"—that's the debtor—"and the creditors' trust

have the duty and responsibility of carrying out the plan."

Citing Section 1142(a) of the Bankruptcy Code.

The trust was created for no other reason but to pay Sonner's debts and under the terms of the plan, the mandate is clear that they must be paid. That's the only purpose of this liquidating trust in Sonner. That's our only purpose. We give back everything we have left over.

We don't end up with anything. We get paid only as a result of the service in identifying, fixing the amounts and paying claims. The debtor gets everything else.

That's exactly what we have here.

THE COURT: Who determines how much money [106] is to be placed into the trust that the liquidating trustee is handling?

MR. STETTIN: It was determined under the plan as follows. All of the 541(a) assets were put in, including but not limited to the cash available, which was the Washington proceeds and the cash that would be available when the Miami Center was sold. That was the start up money.

If you needed more, the trust included all of the 541(a) assets. If you don't need anymore, then you didn't go to it. If you had money left over, whether you went to the other assets or not, you gave it back to the debtor, and that's exactly what we propose to do.

THE COURT: What if you need more money at any given time? Where do you get it if these funds have been exhausted?

MR. STETTIN: If the debtors' 541(a) assets are exhausted and there remain unpaid claims of any kind, the trust simply is unable to pay them.

THE COURT: You have no reservoir?

MR. STETTIN: No, there is not, and those claims have to be paid in the order of strict priority as well. That is crit-

ical in this case. That is the reason why we are concerned and filed this proceeding [107] because we don't know that we have enough.

We will know, we will have enough, in my opinion, if we don't have tax liability.

I believe that that doesn't answer the question. Obviously, we still need to determine as a matter of law whether we have the obligation to file a return, to determine the tax and to pay the tax.

THE COURT: What is your position on the fact that a tax is or is not owed?

MR. STETTIN: There is no tax owed by the liquidating trust. There is or may be a tax owed by the debtor. That's not our fight. The debtors continue in existence. The post-confirmation debtors remain viable entities. The Internal Revenue Service has all kinds of remedies available to them. It is not our dispute.

I am also—I don't wish to give the impression that we are not relying on this. If there is a determination made by the Court under any circumstances that we owe tax monies, the Bank of New York in fact is required to indemnify us on two theories.

One, the indemnification which is in evidence that they gave us saying if any liability arises from your conveying this Miami Center property to us, we will make it good to you.

THE COURT: And?

[108] MR. STETTIN: The second one is that they caused this problem. They put out a disclosure statement and a plan and didn't provide for this obligation and everyone relied on it.

The most horrible result that I can imagine is some $500 creditor who got paid two years ago is going to have someone knocking on his door saying give it back because your

priority of payment rights are below those of the Internal Revenue Service. Give it up.

I don't want to be the person to go to them. I think the Bank of New York should make it good.

THE COURT: Let's send Francis Carter. What do you think?

MR. STETTIN: The only other claim made by the Internal Revenue Service, they have a right to require this estate to file a return and pay the tax is the next subsection in 6012, and that is returns of estates and trusts. Returns of an estate, a trust or an estate of an individual, Mr. Gould in this case, under Chapter 7 or 11 of Title 11 of the United States Code, shall be made by the fiduciary thereof.

We are a fiduciary under the plan in the sense that we owe a duty to Mr. Gould to make sure we [109] perform our functions correctly. We do because he is the residuary beneficiary. Every beneficiary of a trust has the right to say his trustee is his fiduciary. That does not mean that we are a fiduciary in the sense that we are a continuing, ongoing business entity who has a separate existence requiring them to pay taxes.

We are nothing but an interim machine designed to provide the neutral means of determining who the creditors are and getting them paid. We were created by a contract. We cease to exist when our function is fulfilled.

To say that we have a tax paying function, it seems to me, is to transmute us into a brand new entity. We were not created that way. We were not anticipated to carry on business activities. We don't sell wine or beer. We don't sell widgets, we simply have the money that we have and identify who the creditors are and then pay them and then go out of existence.

To say that we have to pay tax means that the debtors in fact then avoid that responsibility. There is no other

theory espoused by the I.R.S. other than that we are a trust required to pay taxes. We are not that kind of trust.

The only other incident I have ever been [110] able to locate, and I wanted to refer the Court to it, is a definition which the Internal Revenue Code has as to a liquidating trustee. A liquidating trust, rather.

The citation is in the definition section under 7711, it is from the Volume 9 of the C.C.H. Standard Federal Tax Reports, and it defines liquidating trusts.

Let me read it, please.

"Certain organizations which are commonly known as liquidating trusts are treated as trusts for purposes of the Internal Revenue Code.

"An organization will be considered a liquidating trust if it is organized for the primary purpose of liquidating and distributing the assets transferred to it and if its activities are all reasonably necessary to and consistent with the accomplishment of that purpose.

"A liquidating trust is treated as a trust for purposes of the Internal Revenue Code because it is formed with the objective of liquidating particular assets and not as an organization having as its purpose the carrying on of a profit-making business which normally would be [111] classified as corporations or partnerships.

"However, if the liquidation is unreasonably prolonged or if the liquidation purpose becomes so obscure by business activities, that the declared purpose of liquidation can be said to be lost or abandoned, the status of the organization will no longer be that of a liquidating trust.

"Bondholders protective committees, voting trusts and other agencies formed to protect the interests of security holders during insolvency, bankruptcy or corporate reorganization proceedings are analogous

to liquidating trusts but if subsequently utilized to further the control or profitable operation of a going business on a permanent, continuing basis, they will lose their classification as trust for purposes of the Internal Revenue Code."

THE COURT: Let's wrap this up. You are getting near the end.

MR. STETTIN: I am.

We don't owe it because we are not within the definition of any one of the tax reporting and tax paying entities set up by the Internal Revenue Code.

THE COURT: Thank You.

[112] Mr. Carter? Who will represent the bank?

MR. CARTER: I will, Your Honor.

THE COURT: All right. Bearing in mind that you are going to supplement this with a memo.

MR. CARTER: Yes, Your Honor.

THE COURT: Proceed.

MR. CARTER: Your Honor, as to why the liquidating trustee is not liable, I don't want to repeat any of the arguments that Mr. Stettin has made to ably.

I would say to the Court that there is a case that will no doubt be cited by the folks at this table called the I.J. Knight Realty case, and I simply ask the Court to bear in mind, in terms of the distinction Mr. Stettin has made, in that case you had an actual bankruptcy trustee. What we would call, it was an Act case, but what we would call under the Code a Chapter 7 trustee, clearly falling within the purview of the Section 6012 of the Internal Revenue Code.

I think what we are saying here under the Sonner case, we have an entirely different animal with a much more limited purpose that falls outside the purview of the Internal Revenue Code, it's not a taxable entity.

Also, we rely on the Alanwood Steel (phonetic) case, which dealt with the disbursing agent [113] and similarly found the disbursing agent was not liable for the tax.

Again, it's cited and discussed in our memo.

I think what the Court needs to do here is to look at the function that Mr. Smith played, the role he played in this case, what did he do.

Well, he transferred the real estate, which was probably never even actually transferred to him, but he transferred it in the twinkling of an eye and he received some cash and distributed it to creditors.

As far as the tax falling on the debtors, really, that is where it should fall. Remember, the debtors are the ones who have taken the tax benefits from these projects all these years, they are the ones with the operating losses. They are the ones who were waxing fat off the benefits as investors, they are the ones who had the accumulated losses to offset this tax liability, if there is one, and it would not be fair to have the creditors bear the brunt of the tax while they hoard these losses for other projects.

Let me just for a moment, and we will supplement it in our memo, address the arguments. I think what Mr. Stettin has said is the debtors are liable, the trustee is not liable, but if the trustee is [114] liable, then the bank is liable.

THE COURT: I was just going to say, don't get too cozy with the trustee because he may turn on you.

MR. CARTER: Yes, Your Honor, if it comes to that.

First of all, the indemnity is in evidence. We don't believe it's that broad, we don't believe it reaches the issue of tax liability. It doesn't say that it does, nor would it be fair to so construe it.

If we look at what role the bank played, the bank paid full value for this project. Perhaps some might say the bank over paid for this project.

In any event, the bank, Your Honor, satisfied its lien in full, which was some $242 million. It paid another $13 million in cash.

In addition, it gave up its claim on cash collateral so that other creditors might be paid for that collateral, and if there is any residue left of the funds in the hands of the liquidating trustee, those will go to the debtor and not back to the bank, so the bank took for full value here.

There is no question of transferee liability here to the bank, no question that the bank has achieved any windfall or paid less than its fair [115] share.

You know, it's fine to say, well, the plan was defective. Well, that plan has been approved by any number of courts, including this Court, and the appellate courts.

Those decisions are the law of the case, and there is simply no legal basis. I hear an argument that, well, the bank should be liable if the trustee is liable, but we don't hear any citation to any authority because there is none, Your Honor. There is simply no basis there.

Thank you, Your Honor.

THE COURT: Thank you. Very well said and short.

Mr. Gould?

MR. GOULD: We are going to rely on the statutes. The Internal Revenue Code defines a fiduciary as follows, quote:

> "A guardian, trustee, executor, administrator, receiver, conservator or any other person acting in a fiduciary capacity for any person."

7701 Treasury Regulations states that a fiduciary is a person who occupies a person of peculiar confidence towards others, states as follows.

> "Holds in trust an estate to which another has a beneficial title or in which another has a beneficial interest or receives and controls income of another as in the case of a receiver."

Mr. Stettin continually says the trustee is not a receiver. Well, I think a receiver in the old Act was defined as follows: One, to take charge of the property of a bankrupt. Two, to conduct the business of the bankrupt. Three, to afford representation of the estate in an action, adversary proceeding or contested matter when no trustee is qualified or the interest of the trustee may be adverse to that of the estate.

If you read Article V of the bank's plan, you will find that that is exactly what Mr. Smith is. He is a fiduciary and in fact he is a receiver, too, although 11 U.S.C. Section 105(b) specifically precludes the appointment of a receiver.

Mr. Carter was correct. We rely upon I.J. Knight, which says, quote, the pertinent sections of the Internal Revenue Code renders the non-operating trustee, non-operating trustee, of the Code, of a bankrupt corporation liable for the payment of taxes on the bankrupt's income, provided the trustee has possession of or title to substantially all of the bankrupt's property.

[117] Now, this goes on and says since the taxpayer concedes he did satisfy the proviso, he is liable for the payment of taxes and taxable income.

When I was a poor student studying at Oxford University at the feet of some eminent philosophers, I was taught that a logical paradox is something which one makes a statement, a conclusion of which does not follow.

My friend, Mr. Stettin here, has said the trustee holds in his possession, so has the bank, all of the Section 541(a) assets for the bankrupt debtors' estate.

As a matter of fact, it holds more than that. It also holds the assets of the non-filed companies. There are no other assets.

Section 541, according to the bank –

THE COURT: Should he have the assets of these non-filed companies?

MR. GOULD: No, he shouldn't.

THE COURT: All right. Go ahead.

MR. GOULD: But they hold them, they are in their possession, they have received the interest income from them, okay, and they are specifically enumerated in Article V—excuse me, Article V refers to the Section 541 assets. That is it. There is nothing more, unless [118] you once say they have some access to my intellect.

Anything else is intangible. There is no other source of funds for the payment of the income taxes, and we have in fact made a demand upon them to pay the July 31st, 1965 federal and state income taxes, and they have not done that.

MR. MUSSELMAN: 1985.

MR. GOULD: 1985, I am sorry.

Every case that I have seen, I.J. Knight, Sapphire Steamship Lines, simply cites the Code. The bankruptcy tax reform act of 1980 made the Bankruptcy Reform Act of 1978 consistent with the Internal Revenue Code. They can't hold all the 541(a) assets and not pay the taxes.

Now, they want to say that the trustee is simply a disbursing agent, and it improperly has control of 18-and-a-half million dollars of the assets of the non-filed companies, and returns those funds to the non-filed companies, and, yes the non-filed companies are jointly and severally liable for the payment of the income taxes and they will file the returns and pay the taxes, but the trustee is in possession of those assets, too.

Without those assets, the taxes cannot be paid.

[119] I submit that those taxes are payable, Holywell admits they are payable, and this situation is going to get worse because of their claim that they hold all the 541(a) assets although they have not been specifically enumer-

ated. 541(a) assets, for example, the plan does not specifically enumerate my interest in the joint venture as being an assets of the trust.

If you conclude that the trustee hold all the 541(a) assets, including the assets of the non-filed companies and my interest in the Miami Center Joint Venture, you will be confronted with a tax liability in excess of $20 million.

Thank You.

THE COURT: Counsel?

MR. MUSSELMAN: I think the points have been made and I will try to be very brief.

THE COURT: Yes, sir.

MR. MUSSELMAN: It's a small part of the total but I think we need to keep track somewhere along the way to the fact that regardless of how you interpret the plan or the Court orders or anything else, the trustee has also gotten his hands on monies that the [120] orders specifically said he shouldn't, namely, because he took all the proceeds from the Washington property and not the net proceeds which is what the order said he was to get.

Mr. Stettin likes to increase the Alice in Wonderland aspect of this case by saying that though he represents the trustee and the trustee has a trust, and the trust was created as part of a Chapter 11 plan, that proves he is not a trustee under Chapter 11.

I think Alice in Wonderland is the only place where that will fly.

MR. STETTIN: I will just respond briefly to one point –

THE COURT: Let all of them finish.

MR. STETTIN: I'm sorry, I thought they did. I thought he was the last one.

MR. DeLEON: Well, Your Honor –

MR. STETTIN: Oh, I apologize.

THE COURT: This is impetuous youth speaking.

(Laughter)

MR. STETTIN: Thank you for the compliment, Judge.

THE COURT: Mr. Mark would want to say something, Mr. Orr, if he were here.

[121] Would you care to speak in his behalf?

MR. ORR: Judge, I am not exactly clear on what my authority is with regard to speaking for Mr. Mark, but I think it is important, from what I know, I am a newcomer to the situation, but it's important from what I heard that there are several distinctions that need to be made.

One is the order did provide for the net proceeds. Unfortunately, the trustee took the gross proceeds. There is some distinction there.

Secondly, with regard to the Sonner case, that case concerned the transfer of real estate and all the trustee was doing there was acting as a conduit for the transfer of real estate. Here we are concerning substantially money and all the assets for the corporations, including the assets and liabilities, including tax liabilities.

Other than that extent, Your Honor, I think it best that I remain mercifully short and sit down.

THE COURT: Fine. Thank you, sir. This would probably be what Mr. Mark would have said.

All right, Government.

MR. ORR: Thank you.

MR. DeLEON: Your Honor, I will be the briefest of everyone.

[122] THE COURT: Take your time. Don't feel obligated to go under the allocated ten minutes because I am going to be here and the Court Reporter is going to be here, so take your time.

MR. DeLEON: I will file a memorandum in ten days.

THE COURT: That is the extent of your argument, all right.

MR. STETTIN: It's a hard act to follow, Judge.

THE COURT: It is.

MR. STETTIN: I have two comments.

One, Mr. Orr made a very interesting comment. He said Sonner, the case I cited as being factually the closest –

MR. ORR: Objection. Excuse me, Your Honor. I don't usually do it on closing argument.

I don't think I said it was close, I was drawing a distinction.

MR. STETTIN: No, I am saying it is.

MR. ORR: He said I said it was factually close, I was drawing a distinction.

MR. STETTIN: He said it's distinguishable because it –

MR. ORR: Excuse me, Mr. Stettin. I said [123] there is a distinction of that case and the case we are here on.

MR. STETTIN: Sure, he's right. The distinction he said existed there was that case involved the sale of real estate. That is what this case involves, the sale of real estate.

There are no other assets that the trustees has ever had his hands on except the proceeds from the sale of real estate in this case. That is why I say it is factually the closest that I can find.

If Mr. Orr thinks that there is some mistake in that, then let him say it again, Judge, because there ain't no difference between them.

There is one other comment that Mr. Musselman made that I think deserves response and that is he keeps saying I have invented some fact because the monies that we got from the sale of the Washington properties were only supposed to be net, net of tax is what he says. They all say that.

I am going to read you from the order of October 22nd, 1984, which is the order approving the authorizing Holywell Corporation and Theodore B. Gould to consummate

the sale of certain real and personal property and directing segregation of net proceeds due Holywell Corporation and Theodore B. Gould.

[124] That is their order, that is their motion. Judge Britton said:

> "Holywell and Gould be and they hereby are directed to segregate the share of the net proceeds due Holywell and Gould from the sale of the real and personal property approved by this order and to invest such proceeds in accordance with Section 345 of the Bankruptcy Code, and hold same subject to further order of this Court."

The net proceeds that they are talking about there clearly, by definition, were all of the net proceeds they got from the sale. They say, oh, no, that meant we had to pay taxes on it before it became net. They took the net proceeds from their order, from their sale and they put it in the bank. That is the money that the trustee ended up with. The trustee didn't put it there. They did.

THE COURT: If I understand your argument, then, from the gross, they should have kept the money to pay the taxes.

MR. STETTIN: Or said something about that.

THE COURT: Mr. Gould?

MR. GOULD: Thank you.

THE COURT: Do you speak as to [125] Mr. Musselman's response to Mr. Stettin?

MR. GOULD: And Mr. Orr, too.

THE COURT: Mr. Musselman, do you relinguish this opportunity to respond to Mr. Stettin's Alice in Wonderland with the ships and the sealing wax and all those other parodies?

MR. GOULD: First, Sonner.

THE COURT: I guess the answer is yes.

MR. MUSSELMAN: Yes.

MR. GOULD: The answer is yes.

Sonner is a grantor trust with other assets that were specifically put in the reorganized debtor, the grantor trust. We had never granted this trust any existence at all.

Secondly, the debtors, from the very beginning of this proceeding, have said that there was a tax liability related to the sale of those assets and also related to the sale of the Miami Center Limited Partnership assets.

If you recall, I read you Judge Britton's quote prior to confirmation of the plan. I also read to you the finding of fact that he adopted verbatim proposed by the Bank of New York and the January 29th, 1986 order on remand.

There is no question that there were tax [126] liabilities related to this transaction. Everybody knew it. The Bank of New York did not disclose it. That was a material ommision of fact. There are no funds available for the payment of those taxes.

My final point is another quote:

> "Failure to perform this duty, to file the taxes and pay the taxes, if it is required, could result in personal liability for the trustee."

It's the Third Circuit in I.J. Knight, and that's the situation that exists today.

Thank you.

THE COURT: I thank all of you for an interesting, respectful, short hearing, and if you will now submit your memos of law within ten days, simultaneously.

MR. DeLEON: Your Honor, does ten days include the weekends?

THE COURT: Well, let's just give you a date before we get too technical on what that includes.

We have today, the 11th, the next week would be the 18th, so let's say by the 24th. That will be the 24th at 5 o'clock. There will be no responses. Just get it in. Don't respond to anybody else.

You have the opportunity to supplement yours, sir, because no one else has had an opportunity [127] to respond to it, so you might as well supplement it, depending upon what you found out from today's hearing.

MR. ZIEGLER: We will not repeat anything we have already said.

THE COURT: You send Mr. Carter, prepare him to knock on the doors of these people who have already gotten their money.

MR. ZIEGLER: Better him than me, Your Honor.

MR. CARTER: Thank you, Judge Weaver.

THE COURT: Okay. Thank you all.

For the record, let me respond to Mr. Orr's statement. Mr. Orr was here as a spectator, I asked him if he cared to respond for Mr. Mark. He was really not prepared to make a statement today and I am certainly not going to hold you to your statement.

MR. MARK: I appreciate your recognition, Judge.

THE COURT: Thank you.

(Whereupon, the hearing was concluded.)

[128] **CERTIFICATE**

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

I, JACLYN M. OUELLETTE, Shorthand Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I was authorized to and did report in shorthand the proceedings at the foregoing hearing, and that the pages, numbered from 1 through 127, inclusive, contain a full, true and complete transcription of my shorthand report of same.

WITNESS my hand and seal this 13th day of February, 1988.

/s/ Jaclyn M. Ouellette
JACLYN M. OUELLETTE
My Commission Expires:
February 14, 1990.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 Proceedings

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

DEBTORS' OBJECTIONS TO LIQUIDATING TRUSTEE'S SECOND REPORT

Holywell Corporation ("Holywell"), Miami Center Limited Partnership ("MCLP"), Miami Center Corporation ("MCC"), Chopin Associates ("Chopin"), and Theodore B. Gould ("Gould"), Debtors (hereinafter referred to collectively as "Debtors"), respond to the Liquidating Trustee's Second Report in Conjunction with Consummation of the Confirmed, Amended, Consolidated Plan of Reorganization and Amendments thereto, filed by the Bank of New York (the "Plan"), by objecting to certain of the Liquidating Trustee's acts as reflected by the Second Report and requesting this Court to order the Liquidating Trustee to take immediate action to correct or remedy these inappropriate actions. In support thereof, Debtors show that:

1. Many of the Liquidating Trustee's actions, as set forth in the Second Report, to which the Debtors object

are contrary to the Plan, prior Orders of this Court, and the Bankruptcy Code.

2. The Liquidating Trustee has filed the Second Report without being responsive to input by the Debtors and in particular, the Liquidating Trustee has refused to allow the Debtors' Chief Financial Officer to communicate directly with Arthur Andersen & Co., the Liquidating Trustee's independent accountant, even though this Court directed such communication to take place in the Order on Debtors' Motion for Accounting dated April 9, 1986.

3. The Liquidating Trustee has not pursued the resolution of the closing adjustments between the Buyer and Seller (Liquidating Trustee on behalf of Chopin and MCLP). These adjustments have been delayed over seven months since the closing of the sale of the Miami Center to the Bank of New York (the "Bank") on October 11, 1985. It is imperative that the necessary adjustments be made immediately in that the Miami Center Liquidating Trust (the "Trust") is entitled to credit adjustments totaling approximately $3,000,000.00. These include the following: a) a discount for Seller's pro-rata share of the 1985 real estate taxes due to the Liquidating Trustee not paying those taxes during November, 1985 but improperly waiting until March 31, 1986 to make such payment; b) a credit for the excess of the Seller's pro-rata share of the actual 1984 and 1985 personal property taxes compared with the escrowed amounts; c) a credit for the direct cost of inventories and stored construction materials, after the credit of $550,000 given at the closing for the latter is taken into account; d) a credit for the monies Debtors in possession spent to complete construction under the super

priority loans granted by the Court, in that the Bank's purchase price already included a deduction for the estimated costs for completion of construction; e) a credit for the one-half of the title insurance premium charged to Seller in that title insurance already existed on the Bank's mortgage on the subject property and this mortgage has never been satisfied; and f) a credit for accounts receivable for the Pavillon Hotel as of October 10, 1985 which Intercontinental Hotel, as agent for the Bank, has been collecting. In addition, the undefined abatements for 44 unfurnished hotel rooms and missing chattels listed on the closing statement are not warranted and are contrary to the Plan in that the Plan provides for the purchase of the subject property for $255,600,000.00 on an "as-is" basis.

4. The Debtors admit that the Liquidating Trustee holds the stock of Holywell Telecommunications Company and Holywell Leasing Company, wholly-owned subsidiaries of Holywell; however, the Liquidating Trustee acted improperly by either giving the property of Holywell Telecommunications Company and Holywell Leasing Company to the Bank for no consideration or in not collecting rent from the Bank pursuant to valid leases.

5. The Liquidating Trustee has failed to follow the terms of the Plan in that he has paid interest on allowed claims at the same time that the principal amounts of the claims were paid even though the Plan provides that interest shall be paid ninety days after the payment of principal. In addition, the Plan makes payment of interest contingent on the Trust having sufficient assets in the liquidating fund, and the Second Report indicates that the Liquidating Trustee believes a deficit exists in the liquidating fund instead of a surplus.

Further, the Liquidating Trustee has interpreted the Plan improperly and has paid interest as of August 22, 1984, the petition filing date, instead of the effective date

of the Plan. The Liquidating Trustee attempts to justify his payment of interest at the same time as the payment of principal by referring to the Bank's authorization for payment of interest, when the Bank had its claims satisfied first and had no legal right to authorize such payment.

6. The Plan provides for payment of all of Holywell's creditors prior to distribution from its assets in payment of the allowed claims against the other Debtors. The Liquidating Trustee, Street Associates and Eleven Dupont Circle Associates, even though the majority of allowed claims against all other Debtors have been paid.

7. The Liquidating Trustee prematurely sold treasury bills held in the name of Twin Development Corporation, resulting in a loss to the Trust from such sale. This issue is presently on appeal.

8. The Liquidating Trustee has improperly added $3,000,000.00 to the reserves in Class 6 for the Bank's legal and loan expenses, even though the Bank has filed no application for its legal and loan expenses and would not be entitled to such an amount. Although the Trustee professes ignorance as to the need to provide for any reserve for the Bank's legal and loan expenses when he set aside reserves for disputed claims, prior Orders of this Court and even the application for fees of Counsel for the Liquidating Trustee, when he was counsel to the MCLP and MCC Creditors' Committees, had indicated that the Bank would be claiming substantial amount for such expenses.

9. The Liquidating Trustee incorrectly defines Class 1 as "operating expenses unpaid and unreported by the Debtors in Possession but paid by the Liquidating Trustee". Class 1 is defined by the Plan as "Administrative Claims as the same are allowed and ordered paid by the Court".

Approximately $2,294,498.00 of the total of $2,932,800.20 paid to Class 1 creditors were for adminis-

trative fees, the Liquidating Trustee's bond, and payment of Holywell's payroll and operating expenses, all of which were approved by this Court. Contrary to the Liquidating Trustee's statements on pages 4 and 11 of the Second Report, the Debtors provided the Liquidating Trustee with a complete listing of outstanding payables and checks disbursed as of October 10, 1985 in payment of payables. Debtors had to turn over their records to the Liquidating Trustee, so that other amounts coming due after that time were not known to the Debtors. Bank service charges were incurred due to the Liquidating Trustee's removal of and freezing funds in the Debtors' operating bank accounts on October 11, 1985, causing checks disbursed in payment of operating expenses to be returned for "insufficient funds".

10. Certain payments made by the Liquidating Trustee of claims in Class 1, Class 4, and Class 6 are incorrect and contrary to Orders of this Court. Even though the Debtors already have pointed out most of these incorrect payments to the Liquidating Trustee, the Second Report does not reflect that any of these improper payments have been returned to the Trust.

11. The Liquidating Trustee has established reserves that are excessively high and unwarranted for Class 4, Class 5 and Class 6, for real property taxes for 1982 through 1984 and for potential federal income taxes on interest income earned by the Trust, as listed in composite Exhibit "A" to the Second Report. The reserves for these classes should be substantially reduced in that many claims for which reserves exist have been settled or dismissed or the amounts reserved are higher than the present claims.

12. The Liquidating Trustee has underestimated the reserve for Class 1 administrative expenses in providing for only $500,000, as to Debtors' knowledge, applications for legal fees and expenses incurred in the continued administration of the Debtors' estates will exceed $1,000,000.

13. The Liquidating Trustee has withheld for no valid reason payment of a few allowed claims in Class 4 and of numerous allowed claims in Class 6, as shown by examination of Exhibit "E" and Composite Exhibit "K" to the Second Report, which list reserve amounts for these classes.

WHEREFORE, Debtors request this Court to not approve the Liquidating Trustee's Second Report, to order the Liquidating Trustee to correct the improper and incorrect actions he has taken to date which are reflected in his Second Report, and to reaffirm this Court's Order of April 9, 1986 which directed Debtor's Chief Financial Officer to communicate directly with the Liquidating Trustee's accountants.

KENT, WATTS & DURDEN

By: /s/ Betsy C. Cox

FRED H. KENT, JR.
BETSY C. COX
850 Edward Ball Building
Post Office Box 4700
Jacksonville, Florida 32201
(904) 354-1600
Attorneys for Debtors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 21st day of May, 1986, to the parties listed below.

/s/ Betsy C. Cox
Attorney

Barry Davidson, Esq.
Steel, Hector & Davis
4000 Southeast Financial Center
Miami, Florida 33131-2398
Attorneys for Bank of New York

S. Harvey Ziegler, Esq.
Kirkpatrick and Lockhart
1428 Brickell Avenue
Miami, Florida 33131
Attorneys for Bank of New York

Irving M. Wolff, Esq.
Holland & Knight
1200 Brickell Avenue
Miami, Florida 33131
Attorneys for Liquidating Trustee

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Parker, Chapin, et al.
1211 Avenue of the Americas
New York, New York 10036
Attorneys for Olympia & York

Joel M. Aresty, Esq.
Blank, Rome, Comisky, et al.
4770 Biscayne Boulevard
Miami, Florida 33137
Attorneys for Unsecured Creditors' Committee of Holywell

Thomas F. Noone, Esq.
Emmet, Marvin & Martin
48 Wall Street
New York, New York 10005
Attorneys for Bank of New York

John W. Kozyak, Esq.
Kozyak & Tropin, P.A.
607 New World Tower
100 N. Biscayne Blvd.
Miami, Florida 33132
Attorneys for Olympia & York

TOUCHE ROSS & CO.
CERTIFIED PUBLIC ACCOUNTANTS

June 5, 1986

Mr. Theodore B. Gould
President
Holywell Corp.
Post Office Box 6279
Charlottesville, VA 22906

Dear Mr. Gould:

This letter is in response to a request by Ed Schumacher regarding the preparation of the tax return for Miami Center Limited Partneship (MCLP) and Holywell Corporation and Subsidiaries (Holywell).

It is our understanding as a result of substantial consolidation the cash collateral of $28,986,112, held pursuant to a court order of December 13, 1984 was contributed to the confirmed plan. These funds were transferred to the liquidating trustee on October 10, 1985. Prior to the liquidating trustee being empowered, the funds had been invested in U.S. Treasury Securities and substantial amounts of interest were earned. Ed has asked us to look into the taxability of the interest income earned on the funds held by the liquidating trustee. It is also our understanding that all items relating to your individual tax matters will be handled by the accounting firm of Hester, Roth & Callaway.

Based on the above facts, we believe that no new taxable entity has been created by the bankruptcy proceedings for MCLP or Holywell. We further believe that the interest earned on the invested funds should be allocated to the taxable entity that contributed these funds. We will ensure

that this income is included in the tax returns for the entities we prepare.

At this time there is some confusion regarding the scope of our employment under the Bankruptcy Court's Order. We have been advised by our attorney not to proceed with any further processing of tax returns until the position of the liquidating trustee has been clarified regarding this matter. Although we believe that tax work clearly is within our scope as outlined by the Court, until this matter is clarified, we cannot proceed further. As you know, we have already invested time examining some of the issues relating to the return.

* * *

If you should have any questions or comments please do not hesitate to contact us.

Very truly yours

By: /s/ Clifford G. Benson, Jr.

CLIFFORD G. BENSON, JR.

CB/twp

HOLYWELL CORPORATION

March 11, 1987

VIA FEDERAL EXPRESS

Irving M. Wolff, Esq.
Holland & Knight
1200 Brickell Avenue, 14th Floor
Miami, Florida 33131

Re: Miami Center Liquidating Trust
As a Taxable Entity

Dear Irving:

Since the Miami Center Liquidating Trust is not a taxable entity, the interest earned on the funds deposited by the Liquidating Trustee in Certificates of Deposit, Treasury Bills, and Repurchase Agreements has been reported as taxable income in 1985 in accordance with Edgar Schumacher's attached memorandum. The taxable interest income has been segregated to the accounts of Twin Development Corporation, Holywell Corporation, the Miami Center Limited Partnership, and myself. The interest income for 1986 will also be reported separately by each of the above taxable entities.

Sincerely yours,

/s/ Theodore B. Gould

THEODORE B. GOULD

fm
Attachments
cc: Edgar Schumacher, Jr.

M E M O R A N D U M

DATE: March 10, 1987

TO: Theodore B. Gould

FROM: Edgar Schumacher, Jr.

RE: ALLOCATION OF INTEREST EARNED ON TRUSTEE'S BANK ACCOUNTS 1985

For the filing of the debtors' respective tax returns for 1985, it was necessary to determine the correct amount of interest earned on their funds. This had to include the period of 10/10/85 through 12/31/85 while their funds were in the Trustee's accounts. I did the analysis to determine the amounts earned by each debtor.

For my analysis, I used Arthur Andersen's summary of receipts for the period 10/10/85 - 4/30/86. I then analyzed the individual bank statements for each account for these months and also considered the interbank transfers among these accounts.

The attached schedule with supporting schedules indicates the amounts of interest earned by the respective taxpayers for 1985 and the first four months of 1986. For 1986 tax returns, I will do a similar analysis for all of 1986.

For 1985, you earned $16,908.40 in interest from the Trustee accounts and included this amount in your 1985 tax return form #1040.

For 1985, MCLP earned $124,480.33 in interest from the Trustee accounts and this was included in the 1985 MCLP partnership tax return form #1040.

As you know, we are working on the accounting transactions for the tax reporting fiscal year of 7/31/86 for both Holywell Corporation and Twin Development Corporation. Each corporation will be reporting its respective amounts on its form #1120 corporate tax returns.

fm
Attachment

HOLYWELL CORPORATION

March 19, 1987

Mr. Fred Stanton Smith, Liquidating Trustee
Miami Center Liquidating Trust
c/o The Keyes Company
100 North Biscayne Boulevard, 20th Floor
Miami, Florida 33132

Re: Interest Withheld in 1985

Dear Fred:

During the 1985 period of your trusteeship, Sun Bank withheld $8,414.98 of interest earned on the cash investments and deposited it with the IRS. The third report dated 8/30/86 indicated that steps had been taken to have this amount refunded. To date, I have seen nothing to indicate that this in fact has been done.

Since the Miami Center liquidating Trust is not a taxable entity, all interest earned is allocable to the appropriate debtors and no interest should have been withheld by the Bank. The appropriate forms should be filed to get a refund of the $8,414.98.

If, in fact, the Trust had a responsibility to file a fiduciary return (which we believe it does not), those returns are due on a calendar year basis. You therefore would have had to file at the end of 1985 and at the end of 1986. You did not and have not been advised to do so. However, the Debtors, as the appropriate taxable entities, have filed tax returns including the 1985 interest income earned. It follows, then, that your advisors' internal opinion is that the Trust is not a separate taxable entity.

I do not understand how seventeen months have elapsed and this tax matter is still considered an open question and not resolved.

For your information, enclosed is recent correspondence to Irving regarding this item.

We all want to get this Trusteeship closed. This issue is one of the impediments that must be resolved to achieve closing.

Sincerely yours,

/s/ Edgar Schumacher, Jr.
EDGAR SCHUMACHER JR.
Chief Financial Officer

fm
cc: Irving Wolff
Rudy Pittaluga

April 29, 1987

Mr. Fred Stanton Smith, Liquidating Trustee
Miami Center Liquidating Trust
c/o Keyes Company
100 North Biscayne Blvd., 20th Floor
Miami, Florida 33132

RE: Miami Center Liquidating Trust

Dear Mr. Smith:

We presently have outstanding two invoices totaling $70,000 to the Miami Center Limited Partnership (MCLP) (copies enclosed). The services that were performed during the summer and fall of 1986 related to various research on the tax effects of the bankrupt proceedings on MCLP along with the preparation of the 1985 MCLP tax return.

We believe that as part of the administration of the bankruptcy estate you should make every effort to ensure that the required federal and state filings are completed. This would include the appropriate inclusion of interest income being earned by the respective entities on those returns.

We have been requested by Mr. Gould to again begin the process of preparing the 1986 MCLP tax return along with representing MCLP in an ongoing Internal Revenue Service audit. In addition, we have been requested to begin preparing the Holywell corporation's returns for 1985 and 1986. The 1985 Holywell return is already late. We believe that it is in the bankruptcy estate's best interest to get all of these tax returns filed and resolve the IRS audit as quickly as possible while the issues are fresh in everyone's minds. This will save countless man hours later.

We are, however, hesitant to continue providing services when we have had invoices outstanding for such a long period of time. We understand that our invoices have been approved by Mr. Gould, however, they have not yet been presented to the court for payment. We do not know why these invoices have not yet been presented to the court and respectfully request that you submit them for payment so that we can continue to provide the requested services.

We appreciate your consideration in this matter and if you should have any questions, please do not hesitate to contact me.

Very truly yours,

CLIFFORD G. BENSON, JR.

CB.wp

cc: Theodore B. Gould
Irving M. Wolff, Esq.

THE BANK OF NEW YORK

October 10, 1985

Holland & Knight
1200 Brickell Avenue
Miami, Florida 33131

Attention: Irving Wolff, Esquire

Re: The Contract of Sale to be executed by The Miami Center Liquidating Trustee pursuant to which The Miami Center project and other property shall be conveyed to The Bank of New York or its nominee (the "Contract")

Gentlemen:

We are delivering this letter to you at your request and pursuant to your concern that the proper grantor in the Contract and Trustee's Deed should not be the Liquidating Trustee, as provided in the Contract attached to The Bank of New York's confirmed Plan of Reorganization (the "Plan") but should instead, based on your interpretation of applicable bankruptcy laws, be The Miami Center Liquidating Trust.

Under the Plan ". . . all right, title and interest of the Debtor in and to the Trust Property, including Miami Center, shall vest in the Trustee . . . " on the Effective Date (page 20 of the Plan), and " . . . the Trustee shall have full power and authority to: . . . (c) reduce all of the Trust Property to *his* possession and hold the same . . . " (page 21 of the Plan, emphasis added). In addition, please note the express non-recourse language on page 25 of the Plan.

You have indicated that you are unwilling to permit the Contract to provide that the grantor be Fred Stanton Smith as Liquidating Trustee under The Miami Center Liquidating Trust unless The Bank of New York provide an indemnity to said Liquidating Trustee.

Pursuant to your request, the Bank of New York hereby indemnifies and agrees to hold harmless Fred Stanton Smith as Liquidating Trustee under The Miami Center Liquidating Trust for any claims against said Liquidating Trustee, as a result of the execution of the Contract in the manner set forth in the above quoted provisions or any other provision of the Plan.

Very truly yours,

THE BANK OF NEW YORK

By: [signature illegible]

Vice-President

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Civil Action No. 87-0037-C

TWIN DEVELOPMENT CORPORATION, PLAINTIFF

v.

FRED STANTON SMITH, THE BANK OF NEW YORK AND IRVING WOLFF, DEFENDANTS

ANSWERS OF DEFENDANT WOLFF TO PLAINTIFF'S INTERROGATORIES

COMES NOW the Defendant IRVING M. WOLFF and answers the Interrogatories previously propounded by the Plaintiff as follows:

* * * * *

Answer to Interrogatory 2b.

The Bank and its representatives insisted that Fred Stanton Smith, as Liquidating Trustee, execute the documents effectuating the transfer of the assets from the Miami Center Liquidating Trust to The Bank of New York. To save the Liquidating Trustee harmless as a result of the execution of the contract by him as Liquidating Trustee, we obtained the letter of indemnity so that if any claims were made upon the Liquidating Trustee for payment of unpaid taxes, i.e., Internal Revenue Service claims, which would result from the sale and transfer of the property at the closing, the question and payment of the allowed superpriority claims, the accountability to the unfiled subsid-

iaries, and the question of the charging of post-bankruptcy interest, the Liquidating Trustee would be completely indemnified and saved harmless from such exposure.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 Proceedings

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

ORDER EXTENDING DATE FOR FILING PROOFS OF CLAIMS

This cause was heard on December 20, 1984 on the ore tenus application of Finley, Kumble for an order granting it an extension of time within which to file a proof of claim against the Debtors herein, with counsel for Finley, Kumble announcing that such extension was needed because Finley, Kumble may have some pre-petition claims against one or more of the Debtors based on the termination of its lease; it being further suggested that because there might be other creditors in similar situations, the bar date of December 20, 1984 for filing proofs of claims should be extended for all entities which hold claims; the Debtors having consented to an extension of the bar date to January 15, 1985, and there being no objection from any of the Creditors' Committees or secured creditors present; and the Court being fully advised, and sufficient cause appearing therefor, it is

ORDERED and ADJUDGED that effective December 20, 1984, the time period for all entities which hold a claim against one or more of the Debtors herein to file proofs of claims pursuant to Rule 3003(c) of the Bankruptcy Rules hereby is extended from December 20, 1984 to January 15, 1985, the bar date.

DONE and ORDERED at Miami, Florida, this 27 day of December, 1984.

Thomas C. Britton

THOMAS C. BRITTON
U.S. Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esq.
All Members of the Creditors' Committees
All Attorneys of Record

Service of this Order to be Performed
by Fred H. Kent, Jr., Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 Proceedings

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
85-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, MIAMI CNTR LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE GOULD

ORDER SETTING HEARING TO CONSIDER APPROVAL OF DISCLOSURE STATEMENT, SETTING LAST DAY TO FILE APPLICATIONS FOR COMPENSATION, SETTING LAST DAY TO FILE CLAIMS, SETTING HEARING ON CONIRMATION AND SETTING LAST DAY TO ACCEPT OR REJECT PLAN

A disclosure statement has been filed by the debtor as required by 11 U.S.C. § 1125. A hearing will be held on March 25, 1985 at 9:30 o'clock a.m. at Room 1406, 51 Southwest First Avenue, the Federal Building, Miami, Florida to consider the disclosure statement and any objections or modifications to it. The disclosure statement is on file with the clerk of this court. Copies may be obtained from the debtor.

Objections to the disclosure statement shall be filed with the court and served on the debtor, any creditors' committee and, if there is one, on the trustee, Fred Kent, attorney for the debtor, **SHALL MAIL AT LEAST 25 DAYS**

BEFORE THE DISCLOSURE HEARING A COPY OF THIS ORDER, to every creditor, equity security holder and every other party in interest. A copy of the plan and the disclosure statement shall be mailed with this order, only to the debtor, the trustee, any creditors' committee, all professionals whose appointment has been approved by the Court, the Securities and Exchange Commission, the Internal Revenue Service and any party in interest who requests in writing a copy of the disclosures statement or plan.

Notice is given to all prospective applicants for compensation, including attorneys, accountants and other professionals that the deadline to file application for fees in this case is March 25, 1985. Fee applications timely filed, shall be considered at the confirmation hearing.

The debtor has filed a list of creditors and equity security holders pursuant to Rule 1007(b). Creditors holding listed claims which have been scheduled accurately and which are not listed as disputed, contingent or unliquidated as to amount need not file a proof of claim. All other creditors must file a proof of claim on or before January 15, 1985*. n/a of _____ has been appointed trustee of the above-named debtor.

The hearing on confirmation of the plan will be held on April 29, 1985 at 9:30 o'clock a.m. at Courtroom 1406, 51 Southwest First Avenue, the Federal Building, Miami, Florida. Objections to the confirmation of the plan shall be filed with the court ten days prior to the hearing on confirmation, and a copy of such objection must be served on the debtor, the trustee, and any creditors' committee appointed by the court.

April 29, 1985 is fixed as the last day for filing acceptances or rejections of the plan.

NOTICE IS GIVEN that at any hearing scheduled by this order, this court will consider dismissal of this case or its conversion to a chapter 7 liquidation under § 1112(b) upon the request of any interested party made at or before the hearing.

Upon the approval of the disclosure statement, Fred H. Kent attorney for the debtor, **SHALL MAIL FORTHWITH A COPY OF THIS ORDER** to every creditor, equity security holder and every other party in interest and **SHALL MAIL AT LEAST 25 DAYS BEFORE THE CONFIRMATION HEARING COPIES OF THE PLAN, THE DISCLOSURE STATEMENT, THE BALLOT FORM** and a **LIST OF ALL APPLICANTS FOR COMPENSATION ALONG WITH THE AMOUNT CONTAINED IN THE APPLICATION** to these same persons. The attorney shall file a certificate of these mailings.

DONE and ORDERED at Miami, Florida, this 15th day of February, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

xc: Debtor
Fred H. Kent, attorney for the debtors

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 PROCEEDINGS

Case No. 84-01590-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTOR(S)

ORDER REQUIRING FILING OF FINAL FEE APPLICATIONS AND SETTING HEARING ON FEE APPLICATIONS

Over 200 days have elapsed since all applicants were directed to file final fee applications in this chapter 11 case. A confirmation order was entered on August 8, and it is necessary that the applicants supplement the fee applications due to the length of time which has elapsed since March 20 when fee applications were directed to be filed and April 29 when this court held a confirmation hearing where fee applications were also to be considered. Post confirmation matters were conducted before this court on motions of the interested parties.

Therefore, all applicants are required to file final fee applications not later than October 17. Applicants can comply by referring to and incorporating by reference previous applications for fees in this matter with identification of caption and date of filing.

A hearing to consider all applications for compensation and reimbursement of expenses shall be held on October 21, 1985, at 9:30 a.m. in courtroom 1406 at 51 Southwest First Avenue, Miami, Florida.

DONE and ORDERED at Miami, Florida, this 27th day of September, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

Fred H. Kent, Jr.
All Members of the Creditors' Committee
All Attorneys of Record
All Affected Parties

Service of this order to be
performed by Fred H. Kent, Jr., Esquire

Supreme Court of the United States

No. 90-1361

HOLYWELL CORPORATION, ET AL., PETITIONERS

v.

FRED STANTON SMITH, ETC., ET AL.

ORDER ALLOWING CERTIORARI. Filed May 28, 1991.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted. This case is consolidated with 90-1484, *United States* v. *Fred Stanton Smith, et al.* and a total of one hour is allotted for oral argument.

May 28, 1991

Supreme Court of the United States

No. 90-1484

UNITED STATES, PETITIONER

v.

FRED STANTON SMITH, ET AL.

ORDER ALLOWING CERTIORARI. Filed May 28, 1991.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted. This case is consolidated with 90-1361, *Holywell Corporation, et al.* v. *Fred Stanton Smith, etc., et al.* and a total of one hour is allotted for oral argument.

May 28, 1991

U.S. GOVERNMENT PRINTING OFFICE 1991—282 061/40016